CASES AT LAW

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1846.

DANIEL McLEAN *vs.* JOHN DOUGLASS.

In a proceeding by attachment, when an interplea has been filed, the only issue submitted to the jury is as to the title to the property levied on. The jury have no right to assess the value of the property or damages for its detention or destruction.

After property is levied on under an attachment, it is, until replevied, in the hands of the officer, in custody of the law. When the issue as to the title is found in favor of the plaintiff in the interplea, the Court on motion will make an order on the officer for its delivery, a disobedience of which on his part would be punishable as a contempt.

If the officer has voluntarily parted with the property, or by his negligence, suffered it to be destroyed or injured, he is answerable in damages to the owner.

Appeal from the Superior Court of Law of Anson County, at the Fall Term, 1845, His Honor Judge CALDWELL presiding.

The plaintiff sued out an attachment against the defendant, which was levied upon a carriage. Upon the return of the levy, Thomas Waddill interpleaded and

claimed the carriage as his property. Upon executing the enquiry, evidence was given to the Jury, that, since the institution of the proceedings in the case, the article in dispute had been destroyed by the plaintiff, and the jury were directed by the Court, if they found the fact to be so, to give Waddill a verdict for its value, which they did. Judgment being rendered accordingly, the plaintiff appealed.

Winston, for the plaintiff.

No counsel for the defendant.

NASH, J. In the direction given to the jury by his Honor there was error. The only question submitted to the jury was, as to the title to the carriage—their only enquiry whether it belonged to Waddill, for if it did not belong to him, his claim to interplead was falsified, and the plaintiff was entitled, as against him, to a judgment for his costs in contesting it. The argument, which has been submitted to us, may be very satisfactory, to shew that the attachment law needs amendment in this particular; but it has failed to convince us, that we have the power to apply the remedy. The proceedings are under the attachment law of this State. *Rev. St. ch.* 6, the 7th *sec.* points out the mode of proceedings, when property levied on is claimed by a third person, the enquiry that is to be submitted to the jury and the judgment that is to be pronounced by the Court. It directs, that the claimant may come in and "interplead and shall file his petition in writing, setting forth the particular property claimed and by what right or title he claims the same, and the Court shall order a jury to be empannelled, to enquire in whom the title is of such article or property, as may be so levied on, and the finding of such jury shall be conclusive as to the parties then in Court—and the Court shall adjudge accordingly." Thomas Waddill by his interplea avers that the title to the carriage was in him, and upon this point and this alone, the plaintiff in the attachment

takes issue with him. It is the only question that was, or, under the Act, could be, submitted to the jury. Whatever else they found by their verdict was entirely immaterial. The object of the Act it is said, was to prevent a multiplicity of suits, and that denying to the jury the right at once to assess damages, for the destruction of the property, is to counteract this intention. If such was the object of the Legislature, they have not pointed out how it is to be done, further than by settling the question as to the title between the parties to the record. The only judgment the Court is authorized to pronounce is upon the title, and the costs incurred in bringing the interplea. A rightful verdict is the answer of a jury given to the Court, concerning the matters of fact, committed to their trial and examination. Whatever they find beyond this is impertinent and immaterial and to be rejected. After property is levied on under an attachment, until replevied, it is in the hands of the officer—in custody of the law. And when the jury have by their verdict said, it is the property of the plaintiff in the interplea, the Court on motion will make an order upon the officer for its delivery. A disobedience on his part would be a contempt, and punishable by the Court as such. If he has voluntarily parted with it or by his negligence suffered it to be destroyed or injured, he is answerable in damages to the owner.

The presiding Judge erred, in directing the jury to enquire into the value of the carriage, and the judgment for the damages assessed by the jury is reversed; and the Court, proceeding to give such judgment as the Superior Court ought to have given, doth adjudge that the carriage claimed by Thomas Waddill is of the proper goods and chattels of the said Waddill, and that he recover his costs expended in this behalf, in the Superior and County Courts, from the plaintiff McLean. The appellant, McLean, is entitled to his costs in this Court.

Per Curiam. Judgment accordingly.

THE STATE *vs.* BENJAMIN DUNCAN.

On the trial of one indicted as accessary in the crime of murder, a transcript of the record of the conviction of the principal was received in evidence, it appearing in the transcript that after the conviction of the principal he appealed to the Supreme Court, from which the case was sent back to the Superior Court, but the decision of the Supreme Court not appearing in the transcript. *Held*, that notwithstanding this omission, and though the decision should properly have been entered on the record, yet the transcript was good evidence against the accessary, for at most the judgment against the principal was only erroneous.

An accessary cannot take advantage of error in the record against the principal, and the attaindor of the principal, while unreversed, is *prima facie* evidence against the accessary of the principal's guilt.

Evidence on the part of a prisoner, indicted as an accessary in murder, that he was a man of violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the deceased, is irrelevant and inadmissible.

Threats of other persons against the deceased, or admissions by them that they had killed him, are only hearsay and cannot be received in evidence.

The Court, to which, on the removal of a cause, the transcript of record is sent, is the sole judge whether the transcript is properly verified by the seal of the Court from which it is sent, and all other Courts are bound by its decision.

The words *vi et armis* in an indictment are now superfluous, and more especially so in an indictment against an accessary, as his offence tends only to a breach of the peace, and is not, of itself, an actual breach of it.

The cases of *State* v. *May*, 4 Dev. 328, and *State* v. *Moses*, 2 Dev. 452, cited and approved.

Appeal from the Superior Court of Law of Davie County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

This was an indictment against the defendant for being an accessory before the fact to the murder of William W. Peden. On this indictment, the defendant was tried and convicted, and sentence of death being passed, he appealed to this Court. The following are the facts upon which the points presented to this Court arose:

One Underwood was indicted in the Superior Court of Wilkes for the murder of one Peden, and the prisoner, Duncan, was charged in the same indictment as accessary to the fact. At their instance the trial was removed to

Iredell; and, on separate trials there, they were convicted and sentenced to be hanged, and each appealed. At December term, 1845, it was decided by this Court that the judgment against Underwood was not erroneous, and ordered that the decision should be certified to the Superior Court of Iredell, to the intent that the said Court should proceed to judgment and sentence accordingly. At the same term the judgment against Duncan was held to be erroneous and reversed; and a *venire de novo* was awarded; and the usual certificate of that decision was also directed. Those cases may be found reported in 6 *Iredell*, 96 and 98. At the succeeding term of Iredell Court as stated in the record "the said James Underwood being brought to the bar, and being asked if he hath any thing to say, why sentence of death should not be pronounced upon him, and replying thereto that he hath not, the Court doth thereupon, in obedience to the judgment and mandate of the Supreme Court to the Court directed," &c. proceeding then in the usual form of a sentence of death. There was then a *venire de novo* awarded as to Duncan; and he obtained an order for the second removal of his trial to Davie. He was again convicted, and, after sentence thereon he appealed to this Court.

On the trial, there was offered in evidence, on behalf of the State, a transcript of the record of the Court of Iredell in the case of Underwood, in order to shew his conviction and the judgment. It was objected to for the prisoner, because it did not appear therein, what decision the Supreme Court had made upon the appeal; and it was insisted, that it should appear in the record, or at least be made to appear by the order from the Supreme Court. On the part of the State the certificate from the Supreme Court to the Court of Iredell was then produced and read; and the Court then allowed the transcript from Iredell to be read also.

On the part of the State it was proved, amongst other things, that the prisoner had threatened to kill Peden, or

cause him to be killed. Thereupon the prisoner offered to prove, that it was his habit when in a passion, to use violent and threatening language towards others: which, being objected to on the part of the State, the Court refused.

The prisoner offered further to prove, that certain other persons harbored ill-will against Peden and had threatened him; and also that certain others had been suspected and arrested upon a charge of having murdered him. This evidence was also rejected.

Attorney General for the State.

No Counsel in this Court for the defendant.

RUFFIN, C. J. The Court is of opinion, that the transcript from Iredell was proper evidence of the judgment on Underwood, as principal in the felony. It would have been right to set out in the record, as finally made up, the certificate from this Court as having been sent by the Clerk of this Court or brought in by the Solicitor. But to the purpose for which it was offered, we think the record sufficient, as it is. It is true, that, after an appeal to this Court, any subsequent proceedings in the Superior Court cannot be regarded by this Court, when the case is before us as between the parties directly affected by those proceedings, by the appeal of one of them. But as the subject matter in this case, namely, a charge of murder against Underwood, was within the jurisdiction of the Superior Court, the ultimate judgment of that Court, not reversed nor vacated by appeal, it would seem, could not be impeached collaterally by another person, upon the ground that it did not appear that the cause, after the appeal from the first judgment, had not been remitted, and so was *coram non judice*. But however that may be, the record here shews, informally it may be admitted, that the Court in passing sentence, professed to act in obedience to the de-

cision of the Supreme Court on the appeal before taken by the prisoner, which the law, *Rev. St. c.* 33, *s.* 6, directs shall be certified to the Superior Court, and thereupon requires the Superior Court to proceed to judgment and sentence agreeably to the decision of the Supreme Court and the laws of the State. We cannot understand less from this, than that a decision of the Supreme Court had been certified to the Superior Court, which made it the duty of the latter Court to proceed in the case in some manner, though it does not directly appear in what particular manner. The cause cannot therefore be deemed to be *coram non judice;* but, at worst, it is erroneous merely, to pass sentence of death without setting out at large the decision of the Supreme Court, as the authority for the judgment. If, however, it be admitted to be erroneous in that point, yet it will not avail this prisoner; for it seems to have been long agreed, that the accessory cannot take advantage of error in the record against the principal, and that the attainder of the principal, while unreversed, is *prima facie* evidence against the accessary of the principal's guilt. 1 *Hale P. C.* 625, 2 *Hawk. c.* 29, *s.* 40.

The other points of evidence were, in our opinion, properly decided also. The evidence of the violence of the prisoner's passions and language, would rather operate against than for him, as shewing a malignity of heart. At best, it was irrelevant, and could profit the prisoner nothing.

The threats of other persons against Peden, or admissions by them that they had killed him, were but hearsey; and, moreover, could not tend to establish, that Underwood and Duncan were not also guilty as charged. *State* v. *May*, 4 *Dev.* 328. Of the same character are the suspicions entertained by some people, that other persons had committed or been concerned in the murder. Those matters were certainly consistent with the guilt of those parties, and could therefore serve no purpose but to mislead the jury.

There was then a motion in arrest of judgment. One ground was, that the transcript from Iredell (on which the trial was had in Davie,) did not shew the seal of the Court of Wilkes affixed to that part of it, which purported to set forth the transcript brought into the Court of Iredell from the Court of Wilkes. But it is manifest that the statement of the transcript from Wilkes, in the record of Iredell, as enrolled in Iredell, purports to be but a copy, and therefore could not have the impression of the seal of Wilkes. To the Judge of the Court in Iredell, it belonged to determine, as a matter of fact, whether the transcript purporting to come from Wilkes, was verified by the seal of that Court, and really came from it. Having been received as a transcript from Wilkes, and enrolled as such in making up the record in Iredell, it was conclusive in the Court of Davie, that the transcript, which purported to come from the Court of Wilkes, actually came from it.

Another ground is, that the indictment does not lay the offence *vi et armis*. In point of fact, that part of the indictment, which charges the assault and killing by Underwood, lays them *vi et armis;* but in charging Duncan as accessary in the conclusion of the Court, it finds that he "feloniously, wickedly, wilfully, and of his malice aforethought, did incite, move, procure, aid, counsel, hire and command the said James Underwood," &c., omitting "force and arms." And this, we think, is sufficient. It is agreeable to the nature of the offence charged on the prisoner; which is not a crime of which force is a constituent, but merely that of inducing another person to commit such a crime. However it might be at common law or in England, under the statute of Hen. 8, our Act, *Rev. St. c.* 35, *s.* 12, must be deemed to dispense with those terms. As was said in the *State* v. *Moses*, 2 *Dev.* 452, the Legislature meant that it should be sufficient for the indictment directly to aver the facts and circumstances, which constitute the crime, and that is done here

in the words, that the prisoner "feloniously procured, hired," &c. Underwood to kill and murder Peden. In the case just cited, it was considered, that *vi et armis et baculis* were but words of form, now rendered superfluous; and in reference to an indictment against an accessary they are plainly so, inasmuch as his offence tends only to a breach of the peace, and is not, of itself, an actual breach of it. *Hawk. B.* 2, *c.* 25, *s.* 90. *Rex* v. *Busks*, 7 *T. R.* 4.

There is, therefore, no error in the record; and this must be certified accordingly.

PER CURIAM. Ordered to be certified accordingly.

THE STATE *vs.* ZADOCK ROLAND.

After a free person of color has been convicted on an indictment, under the Act of Assembly, for marrying a slave before the passage of the Act of 1845, it is too late for him to apply to the Court to discharge him on the ground that the master of the slave had given his consent to the marriage. The defence should have been made on the trial.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1846, his Honor Judge SETTLE presiding.

This was an indictment against the defendant, a free person of color, for marrying a slave contrary to the provisions of the Act of 1830, (Rev. Stat. c. 91, sec. 77.) The facts of the case are stated in the opinion delivered by the Judge in this Court.

Attorney General, for the State.

No counsel in this Court for the defendant.

DANIEL, J. The defendant, a free negro, at Spring Term, 1844, of Guilford Superior Court, was found guilty

by the jury, on an indictment, for living and co-habiting with a certain female slave named Peggy, the property of one George Albright, contrary to the statute, (*Rev. Stat. ch.* 91, *sec.* 77.)

He was then bound in a recognizance to appear at the next Term; and, at the succeeding Term, the entry on the record was as follows: "It appearing that he (the defendant) has complied with his recognizance entered into at last Term, he and his surety are discharged." This discharge was certainly from his recognizance, and not from the indictment and verdict. At Spring Term, 1846, the defendant was brought into Court, and the State then prayed judgment against him upon the said verdict. The defendant resisted the motion, because, as he then said, the master of the slave Peggy had originally given his consent to their marriage and co-habitation. If this assertion was true, the Act of Assembly passed in the year 1845 repealed the first Act, so far as it related to the defendant's case; and no judgment should have been rendered against him. For the last Act declares, that the first Act shall not extend to cases of intermarriage between slaves and free persons of color, had before the passage of the last Act, where the consent of the owners of the slaves had been given. The last Act was passed, after the defendant was convicted. If his allegation had been true, and he had made it appear to the Superior Court by affidavits, it is very probable the Court might, in its discretion, have set the verdict aside and given him a new trial. But he did not take that course; and the verdict on the record precluded the Court's listening to his evidence as a defence. The Court could not try the fact. There is nothing that shews, that the Court erred in rendering the judgment. This opinion must be certified.

PER CURIAM. Ordered accordingly.

THE STATE vs. GEORGE W. CONOLY.

A Justice's warrant in a civil case was dated in June 1843, the judgment in June 1844, and the execution in September 1844, and the judgment and execution were on the same paper with the warrant—*Held*, that it did not appear on the face of these proceedings, that the judgment was void, so as to render the officer who served the execution guilty of a trespass.

If the judgment could be reversed by a writ of false judgment, yet it could not be impeached collaterally.

The continuances of a warrant need not be stated on the face of the proceedings.

Appeal from the Superior Court of Law of Wilkes County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

The defendant was indicted for violently resisting the service of a *fieri facias* by a Constable, which was issued on the judgment of a Justice of the Peace, against the defendant and another, for $14 58. The defendant justified his resistance upon the ground that the judgment was void, and also the execution. The warrant was dated in June 1843, and the judgment in June 1844, and the execution sued out in September 1844; and both the judgment and execution were written on the same paper with the warrant. The return on the warrant did not state the time it was served, and the Constable, though examined, was unable to state it, and the Justice, who rendered the judgment, was also unable to state from memory, when he rendered it. It did not appear that there had been any postponement of the trial. Upon these facts, it was agreed that the jury should find the defendant guilty, but subject, nevertheless, to be set aside, and a verdict of not guilty entered, and judgment accordingly, in case the Court should be of opinion, that in law the judgment and execution were void. His Honor held them to be void, and gave judgment for the defendant; and the Solicitor appealed.

Attorney General, for the State.

No counsel in this Court for the defendant.

RUFFIN, C. J. It is not objected, that the subject matter of the suit was not within the jurisdiction of the Justice; and it is not denied, that a Constable is justified in such case by the precept of the Justice, apparently within his jurisdiction, unless he has knowledge of some matter, which, in fact, makes it void. In this case, it is inferred that the Constable had such knowledge, from the fact that he had before him, as well the judgment and warrant as the execution. But that supposes, that those proceedings, upon their face, when taken together, appear to be void. Therein, we think, consists the error in the Superior Court. It is true, we hold that it is contrary to law, and may produce great oppression, for a Justice of the Peace to take the return of a warrant a year after service of it, and proceed to judgment thereon; and no doubt that for that reason the judgment may be reversed on a writ of false judgment, unless, indeed, the defendant voluntarily appeared. But it does not appear upon these proceedings, that this was the case; for they do not shew when the warrant was served, and it may be that it was duly returned within thirty days from its date, and the Justice have continued it from time to time. It is not, indeed, stated on the warrant that the case had been continued; nor need it be thus stated, that is, in order to prevent the proceedings from being void on their face; for the statute cures "a miscontinuance or discontinuance" in proceedings in Courts of record, and much more are objections, founded on those defects, to be overlooked in respect to proceedings before a Justice, as the statute of 1794 expressly provides, that they shall not be set aside for any matter of form, if the substantial matters required be set forth. Therefore, the Constable could not know that the Justice had not continued the trial from time to time, though he had not entered the continuances; and he had a right to assume that such was the case, as there is a presumption, that, as to matters within its jurisdiction, every Court has proceeded regularly, and that

the judgment is right, until it be in due course of law reversed. It is true, that the Justice was examined on this trial, and it is stated, did not prove that what has been supposed was true; but he did not prove the contrary, and if he had, that did not appear to the Constable upon the papers. That officer was, for aught he saw, obliged to execute the *fieri facias*, and therefore he ought to be protected in it. There may have been something very wrong in the case; but if there was, this is not the way in which the defendant should seek redress. He might have had the judgment superseded and reversed, but was not at liberty to resist the execution of the process, which the Constable was bound to proceed to execute, while the judgment remained in force. It is to be remembered, that it is not suggested that the subject matter was not, either apparently or in fact, within the Justice's jurisdiction. When that is the case, a defendant cannot be allowed to pick holes in the proceedings collaterally, although they might be for defects which would be good cause of reversal. Until reversed they must be respected.

Judgment reversed, and judgment for the State on the verdict, which must be certified accordingly.

PER CURIAM. Ordered to be certified accordingly.

DENNIS A. McCREADY & CO. *vs.* AARON P. KLINE.

Under our attachment law, a non-resident creditor may attach the property of a debtor residing in this State, who has absconded or so conceals himself that the ordinary process of law cannot be served on him.

The cases of *Broghill* v. *Wellborn*, 4 Dev. 511, *Taylor* v. *Buckley*, 5 Ired. 384, and *Casey* v. *Harrison*, 2 Dev. 244, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1846, his Honor Judge DICK presiding.

The plaintiffs, who are non-residents of this State, sued

out an original attachment against the estate of the defendant, a resident and absconding debtor, returnable to the County Court of New Hanover. The Sheriff summoned one William Cook, as garnishee. Kline, the defendant (we suppose by the consent of the plaintiffs, for they never replevied) pleaded in abatement, that the plaintiffs were not inhabitants of the State of North Carolina, and therefore had no right to sue him by an original attachment. The plaintiffs demurred to the plea, and the Superior Court (on the case coming there on appeal) overruled the demurrer, and gave judgment that the defendant recover his costs. The plaintiff then appealed to this Court.

J. H. Bryan and *Iredell*, for the plaintiffs.
Strange, for the defendant.

Daniel, J. The first section of the attachment Act (*Rev. Stat. c.* 6) authorizes *any person* to issue an original attachment against any person indebted to him, who hath removed or is removing himself out of the County privately, or so absents or conceals himself, that the ordinary process of law cannot be served on him. The attachment shall be returned to the Court where the suit is cognizable, and it shall be deemed the leading process.

There is nothing in this section of the Statute, excluding a non-resident creditor from having the benefit of it against a resident debtor, who has absconded, or so conceals himself, that the ordinary process of law cannot be served on him. To suppose that the Legislature did not intend to extend this additional remedy to foreign creditors, to be exercised in our own Courts, against our own citizens, who might abscond or conceal themselves, so that the common law process could not be served on them, is to suppose that the Legislature was willing to leave foreign creditors remediless in recovering their debts of our citizens, although they might fraudulently avoid the ordinary process of the common law to bring them before the Court—a supposition which

we cannot for a moment entertain. It is said for the defendant, that the attaching creditor is required by the act to give bond and surety to indemnify the debtor, if the attachment is improperly sued out, and therefore, if a foreign creditor should be construed to be within the act, a citizen of our State would have a very poor chance of indemnity under such a bond, if he should become entitled to sue upon it. To this argument, the answer is, that the Judge or Justice, who is to take the bond, would, it is presumed, never take a surety to it, who resided out of the State. The second section of the act relative to non-resident debtors, and the decisions of this Court, which have been referred to, *Broghill* v. *Wellborn*, 4 *Dev.* 511, *Taylor* v. *Buckley*, 5 Ired. 384, give us no aid upon the question now before us, which arises now for the first time. We are of opinion, that the plaintiffs being non-residents is not a ground to support the plea in abatement, and that the demurrer should therefore have been sustained. The judgment must be reversed, with costs in this Court and the Courts below, and judgment of *respondeat ouster* entered, and the cause remitted, that further proceedings may be had therein according to law and right. *Casey* v. *Harrison*, 2 *Dev.* 244.

PER CURIAM. Judgment accordingly.

THE STATE *vs.* WESLEY CURTIS.

Where the jury find a general verdict of "guilty," the Court must either pronounce its sentence upon the verdict or grant a new trial.

It cannot set aside the verdict and direct a judgment of acquittal to be entered for the defendant.

Even where the jury find a verdict subject to the opinion of the Court on a point reserved, the Court cannot grant a judgment against the verdict, unless the jury say "they find such and such facts, and if, upon them, the Court think the law is with the defendant, they find him not guilty, if otherwise, guilty," or words in substance to that effect.

Appeal from the Superior Court of Law of McDowell

County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

The following case was reported by the Judge:

This was an indictment for perjury. The Solicitor, acting for the State, read in evidence a State's warrant and the proceedings of the committing magistrate thereon. The warrant was against Archibald M. Hemphill, Benjamin C. Hemphill, Jesse Watkins and John R. Hemphill, charging them with an assault and battery on the present defendant. These parties were all arrested except B. C. Churchill, and brought before one Padget, a Justice of the Peace, when the parties were bound over, except Jesse Watkins, who was discharged. Some weeks afterwards, Benjamin C. Hemphill was arrested and brought before the said Padget for examination, and bound over to Court. The defendant was sworn on both examinations, and upon both occasions stated, that "Archibald Hemphill struck him with an axe helve." The defendant's counsel insisted that the proceedings before the said Padget did not correspond with the allegations of the bill of indictment, and that there was a fatal variance, because the bill of indictment charged that "an issue was joined and came on to be tried before the said Padget, wherein the State was plaintiff and Archibald Hemphill, John R. Hemphill, Benjamin Hemphill and Jesse Watkins were defendants"; whereas it was contended that no such issue was joined or came on for trial, the proceedings being a mere examination before a committing magistrate, and, if any issue was joined, it was an issue between the State and Archibald Hemphill, John R. Hemphill and Jesse Watkins, and not between the State and these three and Benjamin Hemphill, who had not been arrested. Thereupon, the counsel for the defendant moved the Court to instruct the jury to return a verdict of not guilty, on account of the variance. The Court reserved the question. Evidence was then given on the question of facts whether Archibald had or

had not struck the defendant with an axe helve, or struck him at all. The issue was then submitted to the jury, who returned a verdict of "guilty," subject to the opinion of the Court upon the question reserved. The Court, upon that question, was of opinion with the defendant, and a verdict of not guilty was directed to be entered. From this judgment the Solicitor for the State appealed.

Attorney General, for the State.
No counsel in this Court for the defendant.

Daniel, J. The defendant was indicted for Perjury. He pleaded "*not guilty.*" By the record sent up, it appears, that the jury found a *general* verdict of guilty against the defendant. The Judge, therefore, had either to pronounce the sentence of the law on motion, or grant a new trial. The record then further states, that the "question reserved coming on for consideration, the Court was of opinion with the defendant, and a verdict of not guilty entered." The jury had not asked the advice of the Court, in a special verdict, whether the defendant was guilty or not, or found a verdict subject to the opinion of the Court, upon any point of law reserved: they had found a general verdict of guilty. The Judge ordered this verdict to be set aside. He had power to do that, but he had no power to pronounce that the defendant was not guilty, in the face of the general verdict of the jury, upon the record, that he was guilty. That the jury intended to find a verdict of guilty subject to the opinion of the Court as to the law, arising upon those facts which are set forth in the case sent up here for our review, is stated by the Judge in the exception, to be a fact; but that is a statement inconsistent with what the jury have pronounced by their general verdict. Even if the verdict of "Guilty" had been expressed to be "subject to the opinion of the Court" upon a point of law reserved, the Court would only have had the power, if the opinion on that point was

for the defendant, to set aside the verdict. There would be no authority to go another step, and change the verdict from one, that the defendant was guilty, into one, that he was not guilty. That can only be done, when the verdict is in that respect special, that is, when in a certain event the defendant is found guilty by the jury, and it is added, "otherwise, not guilty;" or the like. But here, in the record, the verdict is in no degree conditional or dependent; but it is a general and absolute verdict of guilty; and the Court had no power to do more than either proceed to sentence on it, or set it aside and award a *venire de novo*, or grant a new trial. The case now stands, as if no trial had ever been had. The judgment must therefore be reversed and the case tried again.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE *vs.* HIRAM ELROD.

No matter what an officer declares, when he seizes property, if he has a lawful process authorising him to seize the property, he is not guilty of a trespass.

The State v. *Kirby*, 2 Ired. 201, cited and approved.

Appeal from the Superior Court of Law of Ashe County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

The defendant was indicted for forcible trespass in seizing a certain mare, and the case presented the following facts:

The indictment charged, that the defendant with force and arms, and with a strong hand, unlawfully took and carried away a mare from the possession of one David Miller, against the will of said Miller, who was then and there present, forbidding the same. The taking of the mare by the defendant was in the month of August,

in the year 1843; and he, then being an officer, had in his hands an execution against Miller for about four dollars, dated the first day of August, 1843. The defendant, when he first took hold of the bridle, which held the mare, (which bridle was also held by Miller,) demanded her as the property of his father, but he shewed no authority from his father to make such a demand. Miller also claimed the mare as his property: a quarrel ensued between them, and, during the dispute, the defendant for the first time told Miller that he had an execution against him. The Judge charged the jury, that if the execution was not used by the defendant in good faith for the purpose of raising the money due under it, but was used as a mere instrument to get possession of the mare for his father, it was not a justification.

The jury found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Attorney General, for the State.
No counsel in this Court for the defendant.

Daniel, J. We think that the lawfulness of the seizure did not depend upon what the Constable declared, but upon the sufficiency of the authority which he had. *State* v. *Kirby*, 2 *Ired.* 201. Suppose an officer has in his hands a legal and an illegal warrant, and he arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has, that is his justification. It was not material to have inquired what the defendant said when he seized the mare, but only whether he then had a legal authority to justify him. *Crowther* v. *Ramsbottom*, 7 T. R. 658 (Lawrence, J.) *Dr. Grenville* v. *the College of Physicians*, 12 Mod. 386. The declaration or intention of the defendant, at the time he seized the horse, thus appears to have been immaterial; and as Justice Lawrence said, it was improper to leave it to the

jury, since, upon a plea and demurrer, the execution was "*per se*" a legal justification.

PER CURIAM. Judgment reversed and a *venire de novo*.

JASON H. HUNTER *vs.* SAMUEL Y. JAMESON.

When an agent is appointed to sell articles of personal property, the law implies that he has a right to warrant their soundness, in behalf of his principal.

If he sells the articles with such a warranty as binds him personally, and damages are recovered against him upon the warranty by the purchaser, he has a right to be reimbursed by his principal to the amount of such damages, as well as of the necessary costs incurred in defending the suit.

RUFFIN, C. J. dissentient as to the last point.

Appeal from the Superior Court of Law of Macon County, at the Fall Term, 1845, his Honor Judge BAILEY presiding.

This was an action of assumpsit, in which the facts appeared to be these:

The plaintiff was the agent of the defendant to sell for him clocks in the County of Haywood. He sold one to Conrad Rhinehart, which he warranted. He was sued by the purchaser for a breach of the warranty in the County Court of Haywood, and a judgment being obtained against him, he appealed to the Superior Court, and from thence removed the case to the County of Macon, where it was tried, and a judgment rendered against him, which he paid. This action is brought to recover the amount of that judgment and the costs. The defendant was present at the trial in the County Court of Haywood, and treated the case as his.

The presiding Judge instructed the jury that all contracts made by an agent within the scope of his authority, were binding upon his principal; that if they were satisfied the defendant employed the plaintiff to sell clocks

for him in Haywood, he had a right to warrant them, as being within the scope of his authority and connected with the act of sale, and it was not therefore necessary for the plaintiff to show that he was expressly instructed by the defendant to warrant them; that if Hunter was the agent of the defendant, and did not disclose that fact to Rhinehart at the time of the sale, *he* would be personally responsible to Rhinehart, and the defendant would be liable to him not only for the damages incurred, but for all, which he incurred *bona fide* in the defence of the suit brought against him. A new trial was moved for upon the grounds, 1st, because of the admission of improper testimony; 2d, for misdirection as to the law, and 3d, for the additional reason, that if, when the clock was warranted, Rhinehart knew Hunter was an agent, or this was made known to him, he could not have recovered upon the warranty against Hunter, and it was the duty of Hunter to have shewn that upon the trial. A new trial was refused, and the defendant appealed.

No counsel in this Court for the plaintiff.
Francis, for the defendant.

Nash, J. As to the first reason assigned for a new trial, it is sufficient to say the case does not disclose what testimony the defendant objects to, nor does it shew that there was any objection made to the reception of any testimony at the time it was offered. We are therefore to presume it was received by consent, and, after verdict, neither party can be heard in objection to it. Upon the questions of law, we see no error in the opinion of his Honor. The defendant prayed the Court to instruct the jury, that, if he was bound by the warranty, then Hunter cannot recover in this action, because he was not liable, in the suit brought against him, Jameson being alone liable to the purchaser. The instruction prayed for, naturally connects itself with the second objection taken

by the defendant's counsel on the argument, which is, if Hunter warranted the clock to Rhinehart, without instructions from Jameson, and a recovery was subsequently made against him by the purchaser, in law the present defendant is not liable in this action. It is also connected with the third reason assigned for a new trial, namely, that if, when Hunter warranted the clock to Rhinehart, the latter knew he was an agent, and who the principal was, he could not have made a recovery against Hunter, and it was the duty of the latter to have shewn that upon the trial against him. These propositions will be considered together.

In order to show that an agent without special instructions cannot by a warranty bind his principal, our attention has been called to a passage in *Viner's Abr. Tit. Master and Servant, Letter D, p.* 313. It is there stated, if a servant sell a horse, with warranty, it is the sale and contract of the master, but it is the warranty of the servant, unless the master give him authority to warrant. If it is meant that the warranty so made does not bind the master, and certainly such must be its meaning, the principle is not sustained by the more modern authorities. In all cases, where a person, in his own right, has power to do a particular thing, he may do it by another, and in every delegation of power to an agent, is included the authority to use all the means that are usual and necessary to the execution of it with effect—2 *H. Bl.* 618—unless specially restricted in the mode. Thus, an agent, employed to get a bill discounted, may endorse it in the name of his principal, so as to bind him, unless expressly restricted. *Fen and Harrison*, 3 Term, 757. So a servant entrusted to sell a horse may warrant him, unless forbidden. *Brown on Actions*, 174, 29 Co. Litt. 1299. *Paley on Agency*, 210, 28 Law Libr. 91. Nor is it necessary for the purchaser in such case to shew, that the agent had any special authority to warrant. The employment gave the power. *Hilyear* v. *Hawke*, 5 Esp. N. P. Ca. 75, 3

Term Rep. 757, *Alexander and Gibson*, 2 Camp. 555. These cases are at war with the doctrine in Viner, and overrule it. They establish conclusively, that, in every general agency by parol, the agent has authority to bind his principal by a warranty. We are not considering now, nor is it necessary in this case, how far the restriction, put by the principal upon an agent's power in selling, affects the purchaser. The question does not arise. The jury have found that Hunter was a general agent for the defendant in selling clocks for him in the County of Haywood, and it is not pretended that he had been forbidden to warrant. *Runquish and Ditchell*, 3 Esp. 65. Nor does the case of *Fen and Harrison*, 3 Term 757, aid the defendant in his position. There, the agent, who was employed to get a bill discounted, was informed by his principal, that he would not indorse it, and the question was, he having done so, whether the principal was liable to the indorsee—not the case we are considering. But, in that case, Lord KENYON doubted, or rather denied, the case, cited at the bar, of the servant warranting a horse on a sale, contrary to the instructions of his master, and says expressly, the maxim of *respondeat superior* would apply, and the principal has his remedy against the agent. But, as before remarked, that is not the case here. The case of *Fen and Harrison* was before the Court of King's Bench three times. In the two first trials, it was treated as the case of an indorsement by an agent, who had been forbidden so to do; and the contest was, whether, under such a power, the agent could bind the principal. On the third trial it was shewn, that the principals, the defendants, did not say they would not indorse the bill. The Court were unanimous in deciding, that, as the defendants had authorized their agent to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts. 4 *Term R.* 178.

But it is said, that although the defendant may have been bound to answer to the purchaser by the warranty

made, he is not answerable to the plaintiff, nor bound to repay to him the money recovered from him by the purchaser. In support of this proposition, it is said, that, if Hunter, at the time he sold the clock to Rhinehart, made known the name of his principal, the latter alone would have been bound; and the purchaser could have had no action against him. But, as he chose not to do so, the warranty was his own personal contract, and the money, paid by him on the judgment, was money paid on his own account, and not on that of the present defendant. Without stopping to enquire the extent to which the first branch of the proposition is true, because the question does not arise here, we cannot yield our assent to the second branch. We do not so consider the law to be. We admit, that, by not disclosing his principal, he subjected himself to the action of the purchaser, but assuredly the purchaser had a good cause of action against the present defendant, the principal. When an agent, in making a contract of sale, does not disclose the name of his principal, the purchaser, when he discovers the principal, has his election which to sue, and if he can sue the principal, it must be because he is bound by the contract of warranty as well as of sale. *Patterson* v. *Grandasequi*, 13th East. 62. Although then it be true, that by not disclosing the name of his principal, the plaintiff subjected himself to the action of Rhinehart, it was upon a contract made by him for the defendant, which by his agency the defendant authorized him to make. The doctrine, it is likely, is founded upon what is said in Viner, in the passage before referred to. We know of none other. It is there said, that when a servant does so warrant a horse, it is the sale and contract of the master, but the warranty of the servant, and the master is not answerable upon the warranty, because not annexed to the contract. But we have seen that the leading principle of that case has been over-ruled, and with it must fall the incidents; the warranty is annexed to the con-

tract. If the doctrine were, as contended for, it would present a singular result. The purchaser, having his election to sue either, by bringing his action against the agent would throw the whole responsibility on him and the whole loss on him, for he would have no redress on his principal, for whom and by whose authority he was acting. This cannot be so; it would be unjust. Here is an unrestricted agency to sell, and it confers the power to sell, in the usual and customary way, *Paley on Agen.* 212—28*th vol. L. Lib.* 91, and when such a contract exists, the law implies a guaranty on the part of the principal to indemnify the agent from all the legal consequences, that follow the sale. This principle is fully established by the case of *Adamson* v. *Jarvis*, 4 Bing. 66, 13th En. C. L. R. 345. There the defendant had employed an agent to sell for him certain goods, to which it subsequently appeared he had no title. The agent sold the goods, and was sued for their value by the true owner and a recovery had against him, and that action was brought by the agent to be indemnified. Chief Justice Best, in delivering the opinion of the Court, says: "It has been stated at the bar, that this case is to be governed by the principles which regulate all laws of principal and agent—agreed—every man, who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify for all such acts as would be lawful, if the employer had the authority he pretends to have." This covers the principle of the case before us. The defendant, Jameson, not only seemed, but had the power, to authorize the plaintiff to make the warranty, and did so authorize him, as far as the case discloses the fact to us. As there observed, auctioneers, brokers, factors and agents do not, generally, take regular indemnities. The consequences would, to them, be serious, if having sold goods, and paid over the proceeds, upon being made to suffer in damages for a breach of a warranty, they should find the loss must be theirs, and

that they had no legal claim upon their principal for indemnity, for whom and at whose request they had acted. The doctrine of this case has been recognized both in New York and in Connecticut. *Powell* v. *Trustees of Newburgh*, 19th John. R. 228. *Stocking* v. *Sage and others*, 1st Day's Rep. 522, and is perfectly in accordance with reason and justice.

We have examined the other cases relied on by the defendant's counsel, and perceive nothing at variance with those cited above.

We are of opinion, then, that the warranty made by the plaintiff Hunter, was within the scope of his authority, and bound both himself and the defendant, and that the latter is bound to indemnify the plaintiff to the full amount of the recovery, made by Rhinehart against him.

On the trial below, the plaintiff, under the charge of his Honor, recovered in damages $70 40; how much of this sum, if any, was allowed for his *expenses* in defending the suit, the record does not state. Nor, indeed, does it show that any thing was allowed on that ground, or for the costs of the suit against Hunter. But we have no doubt the latter were included, and we are of opinion he was entitled to recover them. In truth, the defendant's objection admits he was bound for the costs of the County Court, as he only contests those incurred by the appeal and removal. He was present at the first trial, and, the case states, managed the defence. It is not to be believed that the appeal was without his approbation. If opposed to it, he might very easily have stopped it by paying up the judgment. He did not do so, nor does it any where appear that he made any effort to stop the case. From the record, it does not appear that the plaintiff has recovered, for his costs, more than was taxed against him in the suit of Rhinehardt. The last three cases cited are authorities to shew he was legally entitled to recover them.

As to the want of due form in the judgment against the plaintiff, the same remark applies as heretofore given. The defendant comes too late with his objection. It is not the foundation of this suit, but evidence of the amount of the plaintiff's claim.

We see no error in the opinion of the Court below, and the judgment is affirmed.

Ruffin, C. J. *dissent.* The useful habit of free consultation between the members of the Court, while I have had the honor of sitting here, has generally resulted in a concurrence of opinion. When my own mind may not have been entirely satisfied with the result of a conference with them, or the reasoning by which my brethren reached it, yet I have been so much impressed with the public importance of giving to the judgments of the Court all the weight of unanimity, and have been so little wedded to any peculiar notions of my own. that I have willingly yielded to my brethren. I have therefore very seldom ventured to dissent from them; and I should with pleasure adhere to that course now, if what I conceive to be my duty to the law would allow me. Believing, however, that the decision of the Court is against principle, and not supported by any just reasoning, I feel bound to express my opinion against it.

I have to remark, that, as far as my brethren are influenced by the part which Jameson is supposed to have taken in the management of the suit, brought by Rhinehardt against the present plaintiff, they would find upon a closer examination, there is some mistake of fact, which makes it unsafe to put any part of the case on that point. The *case*, indeed, states that the suit was brought in the County Court of Haywood, and that Jameson was present at the trial, and then instructed the counsel and treated the case as his own; and from a judgment against him in that Court, that Hunter appealed to the Superior Court, and thence removed the trial to Macon. That

would be all plain enough, if it were not contradicted by the record of that suit, which is annexed to the case and expressly made a part of it. From *that* it appears, that the suit was brought by Rhinehardt originally in the Superior Court of Haywood, and that it was removed by the defendant, Hunter, before any trial, to Macon: so that there was no trial in the County Court or in any Court before the final trial in Macon, at which the present defendant could have assisted, or done anything to induce the belief that he treated the cause as his own, and thereby sanctioned what had been done by Hunter in warranting the clock, as having been done at his request. But this is a matter of little moment, as it affects only the present parties; and I should not advert to it, were it not to let the parties see, that I had duly ascertained the facts of their case, as well as considered the matter of law. To the general question of law involved in the case, I will now proceed.

The plaintiff declares upon a contract of indemnity, and also for money paid to the use and at the request of the defendant. He could declare in no other way; and both counts involve essentially the same matter both of law and fact. He alleges, in support of them, that the defendant employed him as an agent to sell clocks for the defendant, and that he sold one to Rhinehardt and warranted it to be of good quality, and has been compelled to pay thereon a sum of money as damages and costs, for which he brings this suit. The defendant raised objections, questioning in several forms the authority of the plaintiff to make a warranty upon a sale. But I agree clearly, that, it not appearing that the agent was forbidden, he had the authority to give the principal's warranty, both as between the purchaser and the principal, and the latter and the agent. I agree, moreover, that in such case, if the agent do not disclose the principal at the time of the sale, yet the purchaser may, upon discovering the principal, sue him; for it

is the warranty of the owner, and is annexed to the contract of sale, which is made by the principal through his agent. Further, I yield that the purchaser may, in this last case, sue the agent on the warranty; because, although he was in fact acting as agent, yet the purchaser was not informed of it, but dealt with him as if he had been the owner, and therefore, had a right to treat him as contracting for himself. Therefore, I am willing to say that the warranty was that of each—the principal and the agent; and to treat the case precisely as if the agent had expressly given the warranty of the principal, and also expressly given his own: which, I think, is going as far as the plaintiff could ask. Certainly, nothing less will answer the plaintiff's purpose. For, if he was forbidden to warrant, although the principal might still be liable to the purchaser, upon a warranty made by the agent, yet the agent would be answerable over to the principal for breach of instructions; and, consequently, could not recover for a loss upon a warranty, which he volunteered of his own. So, if the agent had authority from the principal to warrant, and did warrant in the name of the principal, and not for himself, then he, the agent, would not be liable thereon, and there could have been no recovery in the action brought against him. It follows, then, that Hunter must be taken to have given his own warranty, either by itself, or in addition to a warranty of his principal. It is for damages, sustained by reason of a warranty of the properties of the clock, which bound him personally, that he brings this suit. Now, it is clear, the defendant cannot be bound to indemnify him against the consequences of such a warranty, unless the plaintiff entered into it, at the instance of the defendant. In the same manner, a request from the defendant must be shewn in order to support the count for money paid to the defendant's use. For, if the plaintiff paid the money officiously, that is, without being bound for it, or became bound for it officiously, that is, without the defendant's

request to him to become thus bound, he cannot recover from the defendant, by reason of the elementary principle, that no man can make another his debtor without the consent of the latter. I have, then, to ask, where is the evidence of such a request? I see none at all. And, in this, consists the difference between my brethren and myself. There is, unquestionably, no express evidence of a request to the plaintiff to give his, the plaintiff's, warranty to the purchaser as to any quality of the clock. That is not pretended. But it is said that the plaintiff subjected himself to the action of Rhinehardt, upon a contract made by him for the defendant, which by his agency the defendant authorized him to make; in other words, that by appointing an agent to sell a personal thing, not requiring a deed, a request is implied in law to the agent to give *his* warranty, as to the qualities of the article sold. For that position I know not of any authority whatever, excepting only the opinion of my two brethren in this case. I admit, that, by the appointment of an agent to sell a personal chattel, an authority to warrant is implied; but it is an authority to warrant in behalf and *in the name of the principal.* The dispute in the cases is, whether the agent had authority to bind the principal, where the agency was special, or there were instructions to the agent not to warrant. But in not one single case before this, that I have seen, was it ever contended, that from the appointing of an agent, not only an authority is implied to give the warranty of the principal of the goodness of the article, but also a request to the agent is to be inferred, to give his own warranty in lieu of the principal's, or upon the back of it. I believe, if there was such a case, my brethren would have found it. At all events, none such has been cited by them. It is true, the case of *Adamson* v. *Jarvis*, 4 Bing. 66, is relied on for this purpose. But I must say that it strikes me with much surprise that it should be. Not that I deny that case; for I think it good law, and it has been recognized by this Court in *Ives* v. *Jones*, 3 Ired.

538. But while I admit that case to be law, I am surprised that it should be adduced on this occasion; because it relates to a totally different subject. There, an auctioneer was requested by the defendant to sell certain goods as his property, and he did so, and paid the proceeds to the defendant, and then the owner recovered the value from the auctioneer, who thereupon brought that suit to recover back what he had lost. Clearly, he recovered properly; for the law implies a warranty of *title* from every vendor of personal chattels, and there was an *express request* from the defendant to the plaintiff, there, to do the act on which the plaintiff's liability arose, namely, to sell the property as the defendant's; which amounted to a conversion as against the true owner, though an innocent one on the part of the agent. Chief Justice Best, therefore, did not speak loosely, but well weighed his words, when he said, "that every person who employs another *to do an act*," (which is not unlawful,) "undertakes to indemnify him for that act. The defendant there *expressly*" employed the plaintiff to do *the act*" he did, and no more nor less; and therefore the defendant was bound to assume the burden of all the consequences of *that* act." But how that is an authority to shew, that employing an agent to sell goods, and giving him power to make the sale with the warranty of the owner as to the qualities of the goods, amounted to *an implied request* to the agent to give *his* warranty as to the qualities, I am at a loss to conceive. The case cited from Connecticut, cannot, I think, be law. It lays down this doctrine—that if an agent be sued on a contract made in the course of his agency, though the suit be without cause and he succeed in it, the principal is bound to refund all his expenses, and *indebitatus assumpsit* will lie for them. This is binding the principal for all the wrongful suits other people may think proper to bring against one who has been his agent, for an alleged, and falsely alleged, injury by some act, done in the course of the

agency. Even the most express covenant, that of quiet enjoyment for example, is by construction limited to wrongful disturbances, unless a particular person be expressly named. In the case of principal and surety, if the principal pay the debt, and then the creditor sue the surety for it also, and the payment by the principal be established, so that there is judgment for the surety, certainly there is no ground for compelling the principal to reimburse the surety's costs. It would be ruinous; for such groundless suit might be repeated over and over, and the principal by paying the debt, did all that he contracted to do, or could be bound to do. But to return to the case of *Adamson* v. *Jarvis*. The objection there, and in *Betts & Deems* v. *Gibbins*, 2 Adol. & El. 57, was that the plaintiffs could not recover, because they were *tort feasors*, and therefore that the most direct request or promise of indemnity by the defendant, for the wrongful act, would not sustain the action. But here, the enquiry is, whether the plaintiff gave his warranty, on which Rhinehardt recovered, at the request of Jameson. There being no such express request, it is said that it is virtually included in the unrestricted agency to sell; because, from it "the law implies a guaranty, or promise on the part of the principal to indemnify the agent from all the legal consequences that follow the sale." Certainly, this last position, that a contract of indemnity is inferred against *the consequences of making the sale*, is perfectly right, because the agent was *employed to make the sale*. I should never think of gainsaying that. But what are the consequences to an agent from making the sale: what can they be? Why, only a liability to the owner (in case they were not the property of the principal) for the value of the things sold, either in trespass or trover, or an action for money had and received for the price, and that is all. In respect of the qualities of the things, the agent cannot be liable at all from the sale merely. He can only be made liable by something in ad-

dition to the sale itself; by a fraud in misrepresenting the quality or concealing defects knowingly, or by his own engagement as to the quality. I think my brethren, when they say that from an agency to sell, the law implies a promise of the principal to indemnify the agent "from *all* the legal consequences that follow from the sale," cannot mean all their words import; for certainly for a fraud in making the sale, both principal and agent (as one of its legal consequences) would be liable to the purchaser, as wrong-doers; and yet, between them, the law would enforce no promise of indemnity, nor contribution without a promise. Then, as to the remaining method by which an agent may become liable to suffer for a defect in the thing, as a consequence from the sale, which is, by annexing his own warranty to the sale, I must say, that my brethren have merely assumed or affirmed, that the law implies a counter guaranty from the principal, and have not sustained it by adjudged cases, nor proved it by argument. They say, indeed, that it would be unjust that the loss should fall on the agent instead of the principal, "for whom and by whose authority he was acting." But that seems to be plainly begging the question; for, while it is admitted, that he is acting for, and by the authority of, the principal, in making the sale and giving the warranty of the principal—because to that extent there are many cases—yet it remains to be proved by some one case, that in giving his own warranty the agent was also acting by the authority, or at the request of the principal. Wherefore should the law imply, that the principal requested the agent to become his surety, that the articles were of good quality? How can it be so implied? If such a request to an agent to sell shall be implied, why not imply also an authority to him to get a third person to give his warranty in aid, if the agent should happen to think it useful? The one is just as much as the other within the scope of a mere authority to sell, which is all that is

given in words. That implies, indeed, a power to warrant for the owner, but, as it seems to me, not to give the warranty of any body else. It is to be feared, that a notion of the justice of the case, as it is called, arising from the hardship of making the agent bear a loss, when he could not derive a profit from his warranty, may render us forgetful that *the law* requires, that there shall not only be a loss by one person for another, but also that such loss should be occasioned by some act done at the request of the other, before the latter will be bound to make the loss good. It is not sufficient, that the agent should intend to promote the interest of his principal by giving his warranty, unless it be at the instance of the principal. That consideration may move a generous mind to step forward in exoneration of the man, who designed to befriend him. That is equally true of many other cases of voluntary payments for the benefit of others. But still there can be no recovery unless there has been a request. Upon this very question of principal and agent, this Court held, in one of the hardest cases that ever came before a Court of Justice, *Hines* v. *Butler*, 3 Ired. 307, where an agent knew his principal was pressed for money, and, in order to raise it for him, he endorsed a note, which he had to collect, or endorsed a note for a debtor of the principal for the purpose of getting it discounted at bank, and thereby the agent sustained loss, that the principal was not bound to indemnify the agent, although, as the Court expressly says, the agent "did then believe he was doing the best for the principal's interest." Why was that? Because the principal had not given the agent authority to endorse, but only to collect the note, payable to the principal, and had not requested him to endorse the debtor's note negotiable at bank. Therefore, that loss from the officious acts of the agent, though with the very best intentions, in reference, as he thought, to the wishes and the interest of the principal, was thrown altogether upon the agent. How can this be distinguished

from that case? Here the agent was authorized to give the warranty of the principal, and not his own, as in the other case he had power to collect the note, and not endorse it. Upon the ground, then, that there was no request, the action must fail in point of law. But it is extremely probable that it ought also to fail, in point of that sort of justice, which, it is supposed, may be on the plaintiff's side. For how can we tell what might have been the result, if the plaintiff had not given his warranty to Rhinehardt, so that the latter would have been compelled to sue Jameson on his warranty? In that case Hunter might have been called as a witness for Jameson, and might have proved, that he sold without giving a warranty of the principal as to the quality of the clock, or that in fact and truth the quality was such as was warranted. There was, doubtless, a real contest upon one or both of those points in Rhinehardt's suit, as must be supposed from the pertinacious defence of it. A principal has a direct interest in the evidence, to that extent, of the agent, who is ever the most material witness to those points, as he best knows, what verbal contract he did make, and also is, probably, best acquainted with the properties of the thing sold. At all events, this interest of the principal in the evidence of the agent furnishes a strong reason, why the law should require direct evidence of a request to the agent, to give his own warranty, and not imply it, from the mere fact of agency; and as there is no adjudged case found, in which it has been implied, it is very conclusive to my mind, that it ought not, and cannot be implied.

Per Curiam. Judgment affirmed.

LEWIS WHITFIELD *vs.* THOMAS LONGEST & AL.

The ordinance of the corporation of a town, which is authorized to abate nuisances within the town, and which declares that hogs running at large are nuisances, operates as well upon non-residents, who suffer their hogs to run within the limits of the town, as upon those who are actual residents. The case of *Hellen* v. *Noe*, 3 Ired. 495, cited and approved.

Appeal from the Superior Court of Law of Carteret County, at the Spring Term, 1846, his Honor Judge MANLY presiding.

This was an action of trespass, to recover damages for taking a parcel of hogs. On the trial below, the following case agreed was submitted to the Court:

The defendant, Longest, was the Constable of the town of Beaufort, in the County of Carteret, and the other defendants Commissioners. The latter made and published an ordinance, whereby the running at large of hogs in the streets was declared a nuisance, and forbidden; and it was ordained "that each and every hog, found at large in the town, will be taken up and put in pound, and advertised to be sold on the third day, unless the owner thereof shall pay the charges for taking up such hog or hogs. And if sold, the money arising therefrom, after paying the charges, shall be paid over to the owner." The Constable is authorized to charge thirty cents for the taking up, and ten cents a day, for keeping each hog. The plaintiff does not reside within, but adjacent to, the town, and his hogs being found at large in the streets, were, by the defendant Longest, by virtue of the ordinance, taken up. Notice was duly given to the plaintiff, and he was informed, that if he would pay the charges, as established by the ordinance, the hogs would be restored to him. This he declined, and after due advertisement, they were on the third day sold; and this action brought. The presiding Judge gave judgment for the defendants, and the plaintiff appealed.

Iredell, for the plaintiff.

J. W. Bryan, for the defendant, submitted the following argument:

The Commissioners of Beaufort had the power, under the act of the Legislature, to pass the bye-law, and it was for them to determine whether it was *expedient* and *necessary*, and for the Court solely to decide upon its *reasonableness*. *Hellen* v. *Noe*, 3 Ired. R. 493. It would therefore be a complete justification to the defendants, if it operated upon the *property* of the plaintiff, who was a stranger, and did not live within the limits of the corporation of Beaufort. In *Cuddock* v. *Eastwick*, 1 Salk. 192, it is laid down that a corporation is properly an investing of the people of the place with the local government thereof, and therefore their law shall bind strangers. In *Pierce* v. *Bartrum*, Cowp. 269, a bye-law of the corporation of Exeter to prohibit butchers and other persons from slaughtering any beast within the walls of the city, was holden to bind the defendant, though not a member of the corporation, upon the principle that whoever comes to reside in any place, for however short a duration of time, is an inhabitant *pro hac vice*, and consequently is bound by the same regulations as the other members of the corporation are; and, being so subject to the bye-laws, is chargeable with notice of the same. *Village of Buffalo* v. *Webster*, 10 Wendell's Rep. 100. And though in *Franklin* v. *Green*, 1 Bulstr. 11, a bye-law of the corporation of butchers, merely respecting the manner of preparing a particular sort of meat, was holden not to bind strangers, yet it is there said that the law "would have been good to bind strangers, if made to suppress fraud, or any other general inconvenience." There cannot be a greater general inconvenience and nuisance to a town, than that of permitting hogs to run at large in the same, rooting up the streets, &c.; and if this were not obviously so, it is sufficient for the defence, that the Commissioners deemed it a nuisance, and to remedy the

same, passed the ordinance in question, which it is admitted they had a right to do, under the laws and Constitution of the State. *Hellen* v. *Noe, ut supra.* That ordinance is intended to abate the alleged nuisance by taking up, penning, advertising and selling the hogs as therein prescribed, and operates upon the *thing* then within the town, and is expressly extended to all hogs there being, no matter to whom, or where belonging. A stranger is bound to keep his hogs out of the town, and the town authorities, even in self-defence, would have the power to abate such a nuisance even at common law, by penning or impounding them, without subjecting themselves to an an action of trespass. *Cro. Car.* 184. The ordinance does not subject the owner to a penalty; but if the law be settled as it is contended, that if a stranger should come into a town and violate a bye-law, he would be liable to its penalty, and thus it operates *in personam*, the reason of the rule does not cease, but applies with equal force, that if the *property* of a stranger comes into a town and there becomes a nuisance in violation of its bye-laws, the bye-laws so violated operate *in rem.* And it would be an anomaly, indeed, in the law, that the hogs of a stranger should be regarded as being less a nuisance and not liable under the bye-law, whilst those of a corporator were subjected to all its pains and penalties. The absurdity of such a proposition is apparent from its bare statement. The plaintiff had express notice of the impounding of his hogs and the consequent violation of this ordinance, and refused to pay the charge of keeping them, before a sale was made. He therefore has no right to complain. It would seem that all these principles have been affirmed in the case of the *Commissioners of Plymouth* v. *Pettijohn*, 4 Dev. R. 591. In that case, the defendant, not being a corporator, was warranted for a penalty for suffering his cow to lie in the streets of the town after night, and not penning her before dark. And it is there declared, "that there seems as little reason to

question, that one not a corporator, but who comes within the limits of a town, and there violates a police regulation sanctioned by a penalty, becomes liable to pay it, as if he were a member. For a local jurisdiction is vested in the corporate authorities, which embraces all persons and *things* within its local bounds; and he who comes within the limits is no longer a stranger, but for the time being is subject to the jurisdiction as an inhabitant. So too it may be yielded of *things*, as well as persons. The cattle of a stranger straying into the town and there becoming nuisances, or found damage-feasant, may be removed, by way of abating the nuisance; and probably may be restrained and impounded until the owner shall pay the expenses and such pecuniary mulct as may have been before imposed."

NASH, J. We perceive no error in the opinion of the presiding Judge. The common law gives to every corporation power to make bye-laws for the general benefit of the corporators, and the Legislature, by the private act incorporating the town of Beaufort, passed in the year 1825, authorized the Commissioners to make ordinances, for the removal of public nuisances. The ordinances so made must be reasonable and for the general benefit. The Commissioners, then, are clothed with power to make laws to abate nuisances, within the corporation. They have declared, that the running at large of hogs in the streets of the town is a nuisance, and by their ordinance pointed out the mode by which it was to be abated. Their authority to pass the ordinance, so far as the inhabitants of the town are concerned, has not been directly denied; nor indeed is it an open question. The very point, upon this same ordinance, was before this Court in the case of *Hellen* v. *Noe*, 3 Ired. 495, and then received a judicial exposition. The only question now submitted to us is, does this ordinance bind the plaintiff who is not an inhabitant of Beaufort, or his property. It is very certain that the

legislative acts of the commissioners of a town, are, and must be limited to, and can have no effect beyond, the limits of the corporation; but the proposition is not true, that none are bound by them, but those who, in common parlance, are inhabitants of the town. All who bring themselves within the limits of the corporation are, while there, citizens, so as to be governed by its laws. If this were not so, those town laws or police regulations, so absolutely necessary and useful, would be entirely nugatory. No matter how important and necessary, whether to the health or peace of the town, or to the supply of its inhabitants with their daily provisions, they might be set at defiance, so far as the police of the town was concerned, by any individual, who was not a corporator. A citizen may not be at liberty to fire a loaded gun within the limits of the town, but a man whose yard adjoins those limits may do the same act; in him it is not punishable by the law of the corporation, because he is not a citizen. The law is not so. It is the act, which the commissioners have a right to punish, no matter by whom done. But the principle does not rest alone on reason for its justification; it is sustained by legal authority. In the case of *Pierce* v. *Bartram*, Cowp. 269, it is expressly recognized. The defendant was sued to recover a penalty inflicted by the ordinance of the city of Exeter upon any one butchering cattle therein. The defendant had so done, and rested his defence upon the fact that he was not a citizen of Exeter, and that the ordinance could apply to none but such. Lord MANSFIELD declared that the plaintiff having come within the city, was, *pro hac vice*, an inhabitant, and bound by the same regulations as the other members of the corporation. So also the case of *Village of Buffalo* v. *Webster*, 10 Wendell 99, recognizes and enforces the same doctrine. The case of the *Commissioners of the town of Plymouth* v. *Pettijohn*, 4 Dev. 591, fully recognizes the principle of the cases from Cowper and Wendell, and establishes it as the law of this State. The action

was brought to recover from the defendant, who was not an inhabitant of the town of Plymouth, a penalty, incurred, as it was alleged, by the violation of a bye-law of a town, which required owners of cattle to pen them every night, and some of those belonging to the defendant being found at night in the town unpenned, the penalty was considered as incurred by him. The Court say, "when an offence is made to consist of the omission to do an act in the town, he only is within the purview of the law, upon whom, by that or some other law, the act is imposed as a duty to be performed within the town." They therefore held that the penalty did not attach to the defendant, not simply because he was not a corporator, but because of that fact and the additional one that it was for the omission of an act to be done within the town. The Court say that "there can be no doubt that one, not a corporator, but who comes within the limits of a town, and there violates a police regulation, sanctioned by a penalty, becomes as liable to pay it, as if he were a member." But in this case, the plaintiff has done no *act* within the corporation, to bring him within the character of a corporator; that is true, nor is any penalty, as such, or any forfeiture sought to be enforced against him by the corporation of Beaufort. If, however, he has not, in his own person, violated the ordinance of the town, his property has, and through his means. He has, as every other farmer does, turned out his stock to range upon the unenclosed land around him. His hogs were permitted to stray into the town of Beaufort, in violation of the ordinance. Had the defendants a right to take them up and sell them as done in this case? Pettijohn's case puts things within a local jurisdiction, upon the same footing as persons. "The cattle of a stranger (say the Court,) straying into a town and there becoming nuisances, or found damage feasant, may be removed by way of abating the nuisance, and may be distrained and impounded, until the owner shall pay the expenses, and such pecuniary

mulct as may have before been imposed." As to the objection, that there is no judicial decision condemning the property to be sold, we think it insufficient, since the owner may, if he chooses, have a full investigation of the case by bringing an action of replevin, as in any other case of distress.

PER CURIAM. Judgment affirmed.

ELIZA HINTON *vs.* JACOB HINTON, ADM'R. &c.

A widow cannot dissent from her husband's will by attorney. She must do so personally in open Court.

The case of *Craven* v. *Craven*, 2 Dev. Eq. 338, cited and approved.

Appeal from the Superior Court of Law of Gates County, at the Spring Term, 1845, his Honor Judge BAILEY presiding.

Thomas Hinton died in Gates County, having made a will, which was proved in the County Court at November term, 1844. At that term, the following minute was also made of record in that Court: "Eliza Hinton, the widow of Thomas Hinton deceased, appears in open Court by her counsel, Augustus Moore, Esquire, and signifies her dissent to her said husband's will, proved at this term." The widow afterwards filed this petition for a year's allowance out of the testator's personal estate, under the statute. The petition states the making of the will and its probate in the County Court as above; and then alleges, "that at that term the petitioner signified her dissent from the provisions made for her in said will, which was duly entered of record;" and thereupon it prays that a year's allowance may be made and allotted to her, in the usual form.

The County Court denied the prayer of the petition, because the dissent of the petitioner could not be made

through counsel, but ought to have been made by the petitioner in proper person in open Court. From that decision the petitioner appealed to the Superior Court; and there her counsel insisted on the sufficiency of the dissent, as entered of record in the County Court, and also further proved, that at the term at which the will was proved and at each of the terms within six months thereafter, the petitioner was unable, from sickness, to travel to the County Court. But his Honor, for the same reason, affirmed the judgment of the County Court; and the petitioner appealed to this Court.

A. Moore, for the plaintiff.

No counsel in this Court for the defendant.

RUFFIN, C. J. The act of 1784 gives to a widow, who dissents from the will of her husband in the manner therein pointed out, dower and a distributive share of the personal estate. In 1776, the Legislature gave to the widow of a man dying intestate, a year's provision for herself and her family out of his personal estate. And by the acts of 1827 and 1835, *Rev. St. c.* 121, *s*, 22, it is provided, that where a widow shall enter her dissent from her husband's will, within six months after the probate, she may file her petition in the Court where the probate was made, and shall recover one year's provision, as if the husband had died intestate, which the executor shall pay in preference to all other claims. There is no doubt, when the latter acts speak of the widow "entering her dissent from her husband's will within six months after the probate," that reference is had to the provisions of the act of 1784, which originally gave the widow the privilege of dissenting, and is incorporated into the same chapter of the Revised Statute, and forms the first section of it. We are, then, to look to the act of '84 for the time and manner a widow is to dissent from her husband's will. The words are, "that if any person shall

make his last will and testament, and not therein make provision for his wife, by giving or devising to her such part of his real or personal estate, or to some other for her use, as shall be fully satisfactory to her, such widow may signify her dissent thereto before the Judge of the Superior Court, or in the County Court of the County wherein she resides, in open Court, within six months after the probate of the said will; and then she shall be entitled to dower," &c. The question is, whether, upon the construction of this enactment, a widow's dissent must be her personal act in Court, or may be declared through another person, as by an agent constituted by letter of attorney, or, as in this case, by counsel or an attorney of the Court. Upon that question, this Court entertains the opinion held in the Court below.

A very material observation, in the first place, is, that ever since the act passed, the course has been for the widow herself to come into Court and declare her dissent, as her personal act. This shows very strongly how the act was in the beginning intended and understood, and what is the settled sense of the profession as to the proper construction. For it is almost always opposed to the feelings of a widow, in the state of grief from her recent bereavement, to declare publicly her dissatisfaction with her husband's provision for her, after one of his last acts in relation to her; and there can be no doubt, if it had not been thought that her presence personally in Court was indispensable, that the practice would have been as uniform to signify her dissent by letter, or by attorney, as it has, in fact, been for her to do it in her own person. We have enquired from the counsel in this case, and from others, whether the dissent of the widow has ever been received, unless declared by herself to the Court; and all agree, that it was never done. The construction must be conclusive, after having been so long and so uniformly acted on. It has been deemed so obviously the true one, that the Court and the Bar have

acted on it, without any question having been made of its correctness until the present time.

But, independent of the precedents, we should think that the proper construction of the act, from its language and the nature of the subject. The thing to be done is the act of election by the widow, whether she will take under her husband's will or by the law, and, like other cases of election, it is, naturally, to be the act of the party herself. In this case, however, she is not merely to elect and signify to the heirs and executor, that she has done so, in any manner that may be convenient to her, or after she may have had time, from the settlement of the estate, to ascertain whether it would be more to her advantage to abide by the will or not; but she is obliged at all events within six months, and to do so "in open Court." The reasons for those instructions are plain. Before that time, the wife had no absolute right in the husband's personal estate, but he might in his life time or by his will give the whole of it away from her. That was altered by providing that she should have a distributive share of it, provided she elected to take it, as therein prescribed. But it is clear, that the law leans against disturbing the husband's will, except in cases of plain injustice to the wife, and, then, only so far as may be requisite to make the provision for her equal to that the law would have given her, if there had been no will. Independent of the consideration, that this provision in her favor is a new one, and, therefore, that she must be content with it as it is given, and strictly observe the terms upon which she is to be entitled to it, the business of the estate and the interests of creditors and other legatees made it proper, that she should in some reasonable and short time make her election, and also so declare it as to furnish incontestable evidence of it, and conclude her and all persons having claims on or to the estate. Hence, she is limited to six months in point of time; and required to signify her dissent, either in the Superior or County Court, "in

open Court." The object was to have record evidence, both as to the time and the fact; to which all persons might have access, and which could not under any circumstances be controverted. In its nature, therefore, the act is one to be done by the party herself. She could not be represented, as in this case, by counsel or an attorney of the Court merely as such: for there was no suit or any proceeding of that nature, in which the widow, as a party, could appear by attorney. It is an act out of the scope of the ordinary capacity of an attorney or counsel. If it had been done by letter of attorney being *ex parte*, and in the absence of the widow herself, the executor and heir, it would be open to subsequent denial by her, that she executed the power of attorney; and, thus, the other parties would be exposed to all those inconveniences, that would arise, if the widow had the unfettered power of electing at any reasonable time, or in any manner, express or implied, instead of the particular mode specified in the statute. The very terms "such widow shall dissent in open Court," import, that she must appear *in propria persona*. And there are not only the reasons for it, just adverted to, but it is proper, as a wholesome restraint upon a woman against capriciously dissenting from the will of her husband, or doing so for uncertain or inconsiderable gains. It was so regarded by us in *Craven* v. *Craven*, 2 Dev. Eq. 338, 346, where it is said, that "it is a check to the temptations to widows to dissent, where a sense of propriety ought to forbid them, that the dissent must be expressed, while the memory of the deceased is fresh in their minds, and must be declared, not in a chamber, where the influence of public sentiment may be disregarded, but in open Court of their County:" thus clearly conveying the idea, that the widow's dissent is her personal act in open Court, and not *in pais*. We may add, in the language of that case, that "an interpretation upon these statutes is not commended to us by its tendency to remove *this check* upon the abuse of a

power, to which there is (unavoidably, perhaps,) a strong temptation."

The case has been hitherto considered merely as a question of law, upon the construction of the statute, and without adverting to the particular circumstance of the petitioner's sickness, which is stated in this case. That, however, cannot affect the decision. If, in itself, it were material, it could not operate here, because it is not alleged in the petition, as an excuse for omitting to dissent in the proper manner, but the petition states that she did duly dissent. But if the petition had been otherwise framed and had set out that excuse, it would have made no difference. The County Court can only proceed on a dissent declared and entered according to the statute. If there be any equitable ground, on which a widow can claim still to have her election, any reason why she should be deemed not to have forfeited it, although it may be gone at law, the Court of Equity must be asked to consider and relieve upon them. Whether that Court would in any case interfere with the operation of the act, where there had been no fraud by the other claimants of the estate, or would do so upon this particular circumstance, we do not undertake to determine, or intimate. But we hold for the present, that this proceeding will not lie, and that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

MOSES GUESS *vs.* KING BARBEE & AL.

Under the Act of Assembly, Rev. Stat. ch. 81, sec. 3, prescribing the remedy against Sheriffs, Constables, &c. when they have collected money and failed to pay it over, the party injured may have his action on the officer's bond against any one or more of the parties to the bond, without joining the principal or all the sureties.

The case of *the State Bank* v. *Davenport*, 2 Dev. & Bat. 45, cited and approved.

Appeal from the Superior Court of Law of Orange

County, at the Spring Term, 1846, his Honor Judge Settle presiding.

The following is the statement of the case:

The defendants were the sureties for one Tilly in the office of Constable, and he collected for Guess, the plaintiff, the sum of $23 02, and failed to pay it over. The plaintiff issued a warrant against the defendant for that sum, thus due to him, and the interest, and recovered judgment before a Justice of the Peace. The defendant brought the case to the Superior Court by *recordari*; and they then objected, that this proceeding would not lie against them, as Tilly was not a party, he having died before the warrant was issued. The objection was overruled, and the plaintiff had a verdict and judgment, and the defendant appealed.

Norwood, for the plaintiff.

J. H. Bryan, *McRae*, and *Iredell*, for the defendants.

Ruffin, C. J. The objection is founded on the terms, taken literally, of the statute, which, in case a Constable fails to pay money collected by him, gives a warrant against him and his sureties, *Rev. Stat. c.* 81, *sec.* 3: and it is insisted that this remedy can only be pursued against them jointly. It might be sufficient, even if there were nothing else in the act, to rely upon the authority of the case of the *State Bank* v. *Davenport*, 2 Dev. & Bat. 45, that the acts giving summary remedies against officers and their sureties are to be treated as remedial and beneficial, and liberally construed. Therefore, this act ought not to be considered as repealing the general provision of the other statutes, that all contracts are joint and several, and may be sued on accordingly, against all or any one or more of the parties to them. But the subsequent parts of this act shew clearly that it was not the intention of the Legislature to restrict this remedy within the narrow limits of the objection. For example, the 5th

section, after giving 12 per centum interest to the creditor, when a Sheriff, Constable, &c. detains money collected, adds, that he may recover it, "pursuing his remedy against such delinquent or his representatives or his sureties, *whether suing in the manner by this act provided* or in any other way known to the law." It is plain, therefore, that the act gives this redress against the officer and his sureties or any or either of them, in the same manner as if the suit were debt on the bond in a Court of Record. The judgment is affirmed.

PER CURIAM. Judgment affirmed.

WILLIAMS & HIGH vs. D. J. WILLIAMSON, ADM'R. &c.

The declarations and admissions of an agent, after his agency has ceased, as to past transactions, are not competent evidence against his principal.

To make the acts of one person evidence against another, as his agent, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves.

A Constable has no official authority to collect money, except upon execution; and he and his sureties are only liable on his official bond, under the Act of 1818, (Rev. Stat. ch. 24, sec. 7,) giving a remedy to the creditor on that bond for notes, accounts, &c. put into his hands for collection, when it is proved that the Constable was the creditor's agent for collecting the money due on the claims.

The case of *the Governor* v. *Carraway*, 3 Dev. 436, cited and approved.

Appeal from the Superior Court of Law of Columbus County, at the Spring Term, 1846, his Honor Judge DICK presiding.

The following facts were presented by the case:

In October, 1835, the plaintiffs recovered a judgment before a Justice of the Peace, against Bradley F. Yates, on an account for $16 65 and costs; and this is a suit, commenced in July, 1842, against the defendant, as administrator of Yates, on the former judgment, and was

tried on issues joined on *nil debet* and payment. On the trial, the defence was, that Yates paid the debt to one Caleb G. Money. On the part of the defendant, it was found, that Money was a Constable in the year 1835, and served the first warrant on Yates, and that, on the trial thereof, he proved the assumpsit on which the suit was brought.

The defendant then further offered in evidence a written receipt from Money in these words: "Received from B. F. Yates one hundred and fifty dollars, on account of notes and judgments put into my hands for collection." The counsel for the plaintiffs objected to receiving the same in evidence; but the Court allowed it to be read to the jury.

The defendant then further offered witnesses to prove that, in the year 1837, in a conversation between Yates and Money, the former alleged that he had paid to the latter all the claims that Money had as a Constable against him, Yates; and that Money admitted it to be true. To this evidence the counsel for the plaintiff objected: but the Court received it, and the witness further proved, that, among the claims thus spoken of, were some in favor of the present plaintiff, but they could not say that the present was one of them.

The Court therefore instructed the jury, that, if the evidence satisfied them that Money had the claim against Yates placed in his hands for collection, payment to Money bound the plaintiffs; and that Money's acts and declarations in relation to the claim, were evidence against the plaintiffs, on which the jury might find that the claim was paid; for Money was the agent of the plaintiffs, while he had their claims in his hands for collection.

There were a verdict and judgment for the defendant, and the plaintiffs appealed.

D. Reid and *J. Winslow*, for the plaintiffs.

Strange, for the defendant.

RUFFIN, C. J. The receipt given by Money to Yates being without date, it does not appear that the payment was made while Money's office of Constable continued. Supposing, then, he was constituted the agent of the plaintiffs by having their claim put into his hands, while Constable, for collection, with or without suit, there would be a question whether the agency, thus created, would last longer than the office, by reason of which the Constable was constituted the creditor's agent. There might also be an objection to the declarations of Money in 1837, that they were made after the expiration of his office and of his agency, and were admissions of past transactions merely, to which it was not competent to examine him. *Masters* v. *Abraham*, 1 Esp. Cas. 375. *Fairlie* v. *Hastings*, 10 Ves. 125. But without considering those points at all, the Court holds the case to be against the defendant, upon the ground that there was no evidence that Money was the agent of the plaintiffs, and had authority as such to collect the debt.

What an agent says or does within the scope of his authority, and in the course of its execution, binds the principal. But to make the acts and declarations of one person evidence against another, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves. Now a Constable has no official authority to collect money, unless upon execution. His duty is to serve process, and not to act as the plaintiff's attorney. But it was convenient and became usual for creditors to employ persons in that office, as collecting agents, into whose hands were placed the evidences of debt, with authority to receive the money without suit. In consequence of that practice, the Legislature passed the act of 1818, c. 980, (Rev. St. c. 24, s. 7) which requires a constable's bond to be both for the faithful discharge of his duty as a constable, and "for his diligently endeavoring to collect claims put into his hands for collection, and

faithful paying over all sums thereon received, either with or without suit." The act does not impose any new duties or powers on a constable, as such; but merely makes his sureties liable for his acts as agent, as he himself was before. The act creates a security for persons, who employ constables as collecting agents; and that is the whole scope of it, *Governor* v. *Carraway*, 3 Dev. 436. If money be collected by him on execution and not paid over, the case is one of direct official delinquency. When there is no execution, the sureties will not be chargeable by this act, nor the debtor be discharged by law, unless the creditor has made the constable his agent, with authority like any other private agent, to receive the money without process. The act does not make the Constable, who serves the warrant, the agent of the plaintiff in every case. He may still be employed in his official capacity alone; and the presumption is, that he is thus employed, unless there be evidence of the agency over and above such acts as are appropriate to his office. The only evidence in this case was, that Money served the warrant. That was an act purely official; and it cannot be thence inferred that the Constable was the creditor's agent to collect the debt, more than that upon a *capias ad respondendum* a Sheriff may receive the money as he might on a *fieri facias*. The other circumstance, that the Constable was a witness for the creditors on the trial of the warrant, is manifestly material. Those were the only facts adduced to prove Money's agency, and they very clearly, by themselves, are altogether inconclusive upon the point, which it laid on the defendant to establish affirmatively. The act of 1818 plainly points out the kind of evidence proper in such cases. It is such as shews, that "the claim was put into his hands for collection, with or without suit." This may be made to appear by express proof of the delegation of the authority to collect as agent, or by such acknowledgements or requisitions of it by the creditor as will be tantamount.

It is usual in such cases, for creditors to deliver to the Constable the evidence of debt, and take a receipt therefor, expressing that the constable is to collect. But many other circumstances may likewise be sufficient to evince, that the constable was not to act in his office simply, but had the authority of the creditor to receive payment without execution. But as there was nothing of that kind offered on the trial of this case, the very foundation of the defence failed, and it was improper to leave it to the jury to find, upon this evidence, that Money had the claim in his hands for collection, and thereby became the plaintiff's agent to receive payment.

PER CURIAM. Judgment reversed and *venire de novo*.

JAMES HUTTON *vs.* JAMES SELF.

Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned, until he makes a surrender of the whole property so conveyed.

The case of *Adams* v. *Alexander*, 1 Ired. 501, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term, 1846, his Honor Judge SETTLE presiding.

This was an issue of fraud, made upon a *capias ad satisfaciendum* under the 10th section of the Act for the relief of insolvent debtors, (Rev. St. c. 58.) It appeared that the defendant had filed a schedule and given notice, as required by law, which schedule was in the following words: "all my interest, if any, in and to all the accounts on the black-smith's book for work done for sundry individuals, and which is in the possession of, and my interest therein assigned to, Samuel Crutchfield. Given under

my hand, &c." The plaintiff filed the following specifications, which were the only issues submitted to the jury. 1st. As a black-smith. the defendant has many accounts due to him, on a book kept by S. H. Crutchfield, which he has not surrendered. 2dly. He had made a fraudulent transfer of these debts to defeat the plaintiff's claim. Evidence having been offered on both sides, as to the fraudulent nature or *bona fides* of the transfer of the accounts to Crutchfield, his Honor charged the jury that if they believed the plaintiff's evidence they would find for him—if the defendant's, for the defendant.

The jury found a verdict for the plaintiff, whereupon the Court considered and adjudged that the defendant, James Self, be imprisoned, until a full and fair disclosure be made. The defendant then appealed to the Supreme Court.

C. Manly, for the plaintiff.
McRae, for the defendant.

DANIEL, J. The defendant's schedule was as follows: "All my interest (if any) in and to all the accounts on the blacksmith's book, for work done for sundry individuals, which book is in the possession of. and my interest therein assigned to, Samuel Crutchfield." When the issue of fraud came to be tried, the plaintiff offered evidence to prove that the assignment to Crutchfield was made without any consideration. The Judge charged the jury, that if they believed the plaintiff's evidence, they should find the issue in his favor. The jury thereupon found the issue in favor of the plaintiff. The defendant then insisted, that the finding of the jury was altogether immaterial, and he was, notwithstanding the verdict, entitled to take the insolvent oath and be discharged, as he had, after his arrest, filed a schedule of all his interest in the said shop accounts, which interest he insisted would legally be transferred to the Sheriff, as his

assignee, by force of the 10th section of the statute. The Judge was of a different opinion; and he ordered that the defendant should be imprisoned, until he made a full and fair schedule of his property. From this judgment the defendant appealed. The counsel for the defendant now insists that this case is distinguishable from that of *Adams* v. *Alexander*, 1 Ired. 501. He says, that in that case, only the resulting trust of a fund by a fraudulent deed of trust was included in the schedule. But here (he says) the defendant has scheduled *all* his interest (*if any*) in the shop-book and accounts. And the jury having found that the assignment of the book and accounts to Crutchfield were fraudulent and void, now the entire interest in the book and accounts would pass to the Sheriff, by force of this schedule and the statute, disencumbered of Crutchfield's claim. We do not think that this argument is solid. The statute does not merely, upon the finding of the fraud by the jury, vest in the Sheriff the property in respect to which the fraud has been found. Only those interests particularly scheduled vest in the Sheriff, or accrue to the benefit of the creditors, and hence the necessity of a new schedule after fraud found. Alexander, in the case cited, made a new schedule, (after the verdict,) in which he omitted to mention the assignment, which had been found by the verdict to be fraudulent. And we think that the defendant must make a new schedule, and include in it the shop-book and accounts, omitting the assignment to Crutchfield, which the jury have found to be a fraudulent assignment. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF WILLIAM JORDAN & AL. *vs.* JOSHUA A. POOL & AL.

A sale of land, under a *fi. fa.* bearing teste after the death of the defendant in the execution, where his heirs have not been made parties, is void.

The cases of *Wood* v. *Harrison*, 1 Dev. & Bat. 356, and *Bowen* v. *McCullough*, N. C. T. R. 261, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

The following were the facts of the case:

The defendant, Pool, was the Sheriff of Pasquotank, and the other defendants his sureties on his official bond. At the March term, 1841, of the Court of Pleas and Quarter Sessions of that County, several judgments were obtained against Josiah Jordan, who died during the same week and after their rendition. Executions upon these judgments were issued from the same term, returnable to the succeeding one in June. One of them was levied upon all the property of Josiah Jordan, both real and personal, and together with the others, which were not levied, duly returned. From June term, a *venditioni exponas* issued upon the one which had been levied, and *fi. fas.* upon the others. The property so levied on was, at the September term of the Court, sold under all the executions, and produced a sum sufficiently large to discharge them, and leaving in the hands of the defendant Pool, a surplus of $1200. To recover this sum the action is brought upon the Sheriff's official bond, by the relations who are the heirs-at-law of Josiah Jordan, and against whom no process had issued. At the sale made by the defendant Pool, the personal property produced a sum sufficient to discharge the *venditioni exponas*.

The presiding Judge charged the jury, that, under the facts of the case, the sale of the land by the Sheriff was void, as he had no authority in law to make it, and that the surplus was not in his hands in his official character, and the action could not be sustained.

Heath, for the plaintiff.
Badger, for the defendant.

NASH, J. In the opinion of his Honor, we concur. The only question sent here is as to the validity of a sale, made under such circumstances. The land was sold under *fi. fas.* which bore teste after the death of Josiah Jordan, without any *sci. fa.* against the heirs. The effect of a sale so made, has already been declared by this Court in the case of *Wood* v. *Harrison*, 1 Dev. & Bat. 356. The action was to recover the land sold, and the Court decided that the plaintiff was entitled to a verdict, because it was sold by the Sheriff under a *fi. fa.* which was tested after the death of the defendant in the execution, without having previously brought in the heirs. The same principle was decided in the prior case of *Bowen* against *McCullough*, N. C. T. Rep. 261. In this case, the sale was made under like circumstances: it is therefore void. The title to the land is unchanged—it is still in the heirs of Josiah Jordan. They have suffered no wrong or injury. As the land is yet theirs, they have no right to the money produced by the sale. The retention of it by Pool is no breach of his official bond. The plaintiff cannot sustain the action.

PER CURIAM. Judgment affirmed.

MARTIN A. GASH, Ex'r. &c. *vs.* PHEBE JOHNSON & AL.

On the trial of an issue *devisavit vel non*, the Court may instruct the jury to find as to the validity or invalidity of the whole or any part of the will, and the declarations of a legatee against his interest will be good evidence on such trial, so far as his interest extends.

If the declarations of a devisee of land, who is not a party to the suit, be received, that is no cause for a new trial, as the interest of such devisee, in the land devised, will not be affected by the finding in that issue.

Appeal from the Superior Court of Law of Henderson

County, at the Special Term in 1845, His Honor Judge CALDWELL presiding.

The following is the case sent up to this Court from the Court below.

This was a suit in relation to the validity of a paper writing propounded by the plaintiff as the last will and testament of Reuben Johnson, deceased. He died in the year 1843, and by the said paper writing gave all his property, of the value of fifteen thousand dollars, or thereabouts, except the remainder in one of his slaves, to Sarah Johnson, with whom he had intermarried some forty years ago, during the life of a former wife, who is still living. The caveators are his first wife, Phebe Johnson, and his son-in-law and daughter by his first wife. The remainder in said slave, after the death of said Sarah, is given to one Leander Gash, who wrote the will, and who is a relation of the deceased. The caveators on the trial insisted, that the deceased had not capacity to make a last will, because of his great age and infirmities, and if he had, that it was procured to be made by the importunity and undue influence of the said Sarah; and, with a view to shew her undue influence in procuring the said will to be made, they offered to prove her declarations, or what she said before the execution of the said will and after the death of the said Johnson. The testimony was objected to by the plaintiff, but was received by the Court as evidence against the said Sarah. The jury, after being absent for some time, returned into Court and through their foreman said that they found the issue in favor of the defendants, and said further that the jury believed that the deceased had capacity to make a will, but the one in question was made by persuasion. Their verdict, after being recorded, was read over to them, to which they assented. Rule for a new trial granted, and on argument discharged. Appeal prayed to the Supreme Court.

Badger and *Avery*, for the plaintiff.

Francis, for the defendants.

DANIEL, J. The paper writing, which was offered to be proved as the last will of Reuben Johnson, named Martin A. Gash and Sarah Johnston, an executor and executrix to the same. But it appears, that Gash only offered the paper for probate to the County Court of Henderson. The defendants appeared and caveated the paper writing, as a will. The Court ordered an issue of *devisavit vel non* to be made up and submitted to a jury. The issue, which was made up under the order of the Court, was probably framed in such a manner, as to confine the response of the jury (will or no will) to the said paper *in toto*. Whereas, the Court might have directed the issue to have been drawn up specially, for the jury to find, whether the paper writing, propounded as the last will of Reuben Johnson, deceased, was in fact his will, or any part of it, and which part. Frequently, this special mode of framing the issue will be found most advisable. Then the jury may respond, that one ormore of the legacies or devises, mentioned in the paper, is or are not any part of the last will; and that the residue of the paper writing is the last will of the supposed testator. *Trembistown* v. *D. Alton*, 1 Dow. & Clark, N. T. 95. And when a paper writing is propounded by an executor as the last will of a person deceased, and caveated, and a special issue is made up as above mentioned, then the acts and declarations of each legatee and devisee, named in the paper propounded as a will, may be given in evidence, against the interest of that particular legatee or devisee. The acts and declarations of any one of such persons, will not affect the interest of any other person or persons, named in the paper as legatee or devisee, because the interest of each one of them is generally separate and distinct. But even upon the issue in this form, we think that his Honor was correct, in admitting the declarations of Sarah Johnson to be given in evidence against her interest, as far as

that interest extended, and his Honor expressly confines its operation to that. For the executor, fairly propounding and fairly acting, is the *legitimus contradictor* for all the legatees: the verdict of the jury and sentence of the Court are conclusive as to them. *Redmond* v. *Collins*, 4 Dev. 430. A sentence for or against a will is not binding against those who are not parties or privies. But privies are those, who claim through a party, as the propounding executor, or have notice of the proceedings. *Ibidem.* The declarations of Sarah Johnson were therefore evidence against the will certainly, so far as those declarations affected her legacy under the will. But a devisee is not necessarily represented by the executor, and is not affected by a sentence against a will, when propounded by him, unless the devisee is a party to the proceedings, or has notice of them, and he may afterwards establish the will in an action of ejectment, if he is able to do so. So far, therefore, as Sarah Johnson stands as a devisee under this paper-writing, the evidence of her declarations, received by the Court on the trial, were altogether immaterial, as she was not a party to the issue as devisee; and it is never considered a ground for a new trial, that the Judge admitted evidence, which was immaterial to the interest of either of the parties to the issue. The will was attacked on the ground that the testator had not capacity, and also on the ground that it had been fraudulently obtained from Reuben Johnson, by the undue influence and undue persuasions of Sarah Johnson, the principal legatee and devisee under the said paper-writing. The Judge permitted the caveators to give her declarations in evidence to sustain the latter grounds. This had been objected to by Gash. And we understand from the case, it was the only point appealed from. The case states, that the jury found against the will, because it was made "by persuasion." This finding by the jury does not appear by the case to be objected to by the propounder of the will. A will certainly is not void,

because it has been obtained "*by persuasion.*" To make it void, the persuasion must be undue and fraudulent. The executors offered the evidence to shew, as they stated to the Court, that the will had been obtained by the importunity and undue influence of the said Sarah Johnson. We take it, that the jury found the issue for the defendants generally, and the reasons they gave for it cannot be considered by us as a special verdict. Those reasons were given merely to shew that the jury found upon the point to which the evidence was relevant, which was objected to, in order to raise the point of law on which the parties wished the opinion of this Court, namely, the competency of that evidence. The declarations of Sarah Johnson, certainly, were not evidence against the other legatees. But the whole of the evidence given on the trial is not pretended to be reported to this Court. There may have been other evidence beside the declarations of Sarah Johnson, sufficient to satisfy the jury that the will was obtained *in toto* by undue persuasions. We are of opinion, that the judgment be affirmed.

PER CURIAM. Judgment affirmed.

STEPHEN ROGERS *vs.* SAMUEL VINES.

Where, in a decree of divorce, alimony is assigned to the wife in certain specific articles, as, for instance, slaves, the wife's right to the enjoyment of this property only continues until a reconciliation or until the death of either party. And during the separation, the provision for alimony may be altered, at the discretion of the Court, upon any change of circumstances.

Appeal from the Superior Court of Law of Greene County, at the Spring Term, 1846, his Honor Judge MANLY presiding.

This was an action of Detinue for six slaves, which was decided upon the following case agreed. Elizabeth

Rogers, then the wife of the plaintiff, upon her libel in the Court of Equity, obtained in 1837 a divorce from bed and board; and it was decreed further, that she should have "alimony and a separate maintenance of the estate of her said husband; and the Court doth allot as her alimony and separate maintenance, one-third of the rent of a certain tract of land and mill conveyed to the defendant by. &c., and the negroes Esther, Wilie and Mary; and for the purpose of securing the payment and enjoyment of the said alimony, the Court doth further decree, that the defendant deliver to the said Elizabeth the said negroes within five days;" and the decree then provided for receivers to lease the land and mill, and directed them to pay one-third of the rent annually to the wife, and the residue to the husband. The wife received annually during her life, the sum of $60 for her share of the rents. The negroes were delivered according to the decree; and, being a woman and her two small children, they were, taken together, unprofitable to Mrs. Rogers, and she sold them to the defendant on the 13th of August, 1838, for $1000, then paid to her. The other three negroes sued for, are the issue of Esther, born since the defendant's purchase. Elizabeth Rogers died in May, 1845, and, after the defendant refused to give up the negroes, the plaintiff brought this suit. It was agreed, that, if the Court should be of opinion the plaintiff was entitled to the negroes, there should be judgment for him for certain sums as the values of the several slaves and damages, and if he was not so entitled, then that there be judgment for the defendant.

The Court gave judgment for the plaintiff, and the defendant appealed.

Badger, for the defendant.

J. H. Bryan, for the plaintiff, submitted the following argument:

Alimony is an allowance for *maintenance* of a wife from

year to year. 5 *Eng. Ec. Rep.* 129—note to *DeBlaquiere* v. *DeBlaquiere, Poynter on Mar. and Div.*

The divorce *a mensa et thoro* does not dissolve the marriage contract, and neither the rights of the husband or wife as it respects property (except only such as is acquired by the personal services of the wife) are affected by it. *Reeves Dom. Rel.* 209. It does not preclude the wife from her dower. *Co. Lit.* 32 *a.* 10 *Eng. Com. Law. Rep.* 85. *Lewis* v. *Lee.*

The decree of the Court, divorcing *a mensa et thoro*, does not impose any obligation upon the parties to live separately—they can come together again by mutual consent and no conveyance is necessary to vest title in the husband in the property allotted to the wife for her separate maintenance—even where by statute a written transfer is required.

The husband still retains his marital rights in a great degree—they are only partially suspended and the policy of the law encourages the re-union of the parties.

If a legacy be given to the wife in this state of separation, the husband may receive or release it. *Bacon, Ab. Baron and Feme D.* If the *faculties* of the husband increase, the alimony may be increased by the spiritual Court, and *e converso*, which shews that her interest in the allowance for alimony is not absolute, but may be increased or diminished according to the changing circumstances of the husband or wife—it is in truth an allowance to continue during separation only; and that is the very essence and definition of alimony. *Poynter* 85. 2 *Kent. Com.* 127.

There is no essential difference in principle between the doctrines held here and in England, on this subject. 2 *Kent. Com.* 128.

The alimony in this case is allotted under the latter clause of the statute: "by assigning to her separate use such part of the real and personal estate of the husband as the Court shall think fit, not exceeding one-third part

&c. which shall continue until a reconciliation shall take place between the parties."

This is by way of defeasance of her estate. It has the qualities and capacities of a life estate—it may endure for life, but, if the parties be reconciled, it shall cease, so that it certainly does not enlarge the separate estate into absolute property or a fee. The Court may assign a third part of the real estate—the wife is still entitled to dower, because the marriage subsists. Then upon the death of the husband, the heir, upon the supposition that the wife has a fee in the real estate assigned for alimony, would be almost ousted of his inheritance.

By sec. 11, she is entitled absolutely to her earnings—the acquisitions of her industry and management. The allowance is for her maintenance from year to year, which is presumed to be expended, and the law now makes a discrimination between that fund so specially allotted, and what she may *thereafter* acquire by her own industry, as by descent, devise, &c.; and this property may, on her death, be transmissible. Thus, by the rule "*expressio unius est exclusio alterius*," exempting from transmission on her death, the property assigned for her alimony.

Ruffin, C. J. The question is, whether, when slaves, or other specific part, of the husband's estate, are assigned to a wife for alimony, she has the absolute property in them. For the defendant it was contended, that she had, by force of the 3d section of the divorce act, *Rev. St. c.* 39. That authorizes the Court to allow her such alimony as her husband's circumstances will admit, not exceeding one-third of the annual income or profits of his estate or occupation, or to assign to her separate use such part of the real and personal estate of the husband as the Court shall think fit, not exceeding one-third part thereof, as the justice of the case may require, which shall continue until a reconciliation shall take place between

the parties." It was argued, that, as the profits of specific property are uncertain, and especially land in this State, and an increasing family of slaves, under the management of a woman, the Legislature must be supposed to have intended for her a greater benefit than the labor merely of the slaves and the products of the land during her life. This was insisted on the more, as being supported by the terms in the act "to her separate use," that being a phrase well known in the law, and to be received in the sense in which it would be, if contained in a will or deed. And it was thence concluded that the wife had the property in the slaves, or, at least, the *jus disponendi*. But the Court cannot place that construction on the act. We think the wife had no estate in the slaves, but that the personal enjoyment of them only was secured to her during her life, at most, and subject to cease upon a reconciliation, or be defeated by the order of the Court.

The act gives alimony. Now, "alimony" in its legal sense may be defined to be that proportion of the husband's estate, which is judicially allowed and allotted to a wife for her subsistence and livelihood, during the period of their separation. *Poynter on Marriage and Divorce*, 246. *Shelford on Mar. and Div.* 586. In its nature, then, it is a provision for *a wife*, separated from her husband; and it cannot continue after reconciliation, or the death of either party. There is no occasion for it after the death of the husband; for she then becomes entitled to dower and a distributive share, though divorced *a mensa et thoro*; unless, indeed, she should lose dower by leaving her husband and living in adultery. *Co. Lit.* 32, 33. Moreover, the decree for alimony vests in the wife no absolute right to the allowance, whether it consist of money or specific things; for, besides that it ceases upon reconciliation, it may be changed from time to time, and reduced or enlarged, in the discretion of the Court. *Otway* v. *Otway*, 2 Phill. 109. *Foulkes* v. *Foulkes*, 3 Hagg. Ec. R. 329. The phrase "separate use" was not, as we

think very clearly, used in the technical sense imputed to it, but it means merely the personal use or separate enjoyment of the wife, while living away from her husband, and, in that sense, having the separate use of the property. If it had been intended, that, as to the property assigned for alimony, the wife should substantially be a *feme sole*, the intention would have been declared in language as clear and explicit as that in the 11th and 12th sections touching her own acquisitions. Those sections expressly give the divorced wife the power of holding the acquisitions of her own industry, and donations to her, against her husband and his creditors, and of disposing of them; and upon her death, without having disposed of them, they are transmissible as though she were unmarried. There is a marked distinction, therefore, in the manner in which the Act speaks concerning the wife's rights in property made by her labor, or bestowed on her by friends, and in that the law assigns as alimony out of her husband's estate. The former is her property to all intents and purposes—to be enjoyed, sold, or given, as if she were sole. The latter is a provision for her livelihood, while she is the man's wife and lives apart from him. This is the construction from the legal signification of the term "Alimony" by itself; and especially when contrasted with the precise provisions respecting her rights over her own property. But other parts of the Act prove the correctness of this construction. The 10th section, for example, treats "alimony" and "separate maintenance" as synonimous, and shews the sense in which "separate use" in the 3d section is to be taken. The provision, too, that her separate use shall continue until reconciliation is absolutely inconsistent with a power of sale in the wife. For, either the sale would prevent the re-vesting of the property in the husband upon a reconciliation, which would defeat the policy of the Legislature, and, indeed, directly contradict the act; or the wife would have the power of defeating her sale by re-

turning to her husband, which the Legislature could never intend. Besides, the second section goes a little beyond the third, as to the period for which the alimony shall continue, by saying that it shall be "as long as the justice of the case may require": thus fully preserving the idea of alimony, as defined by the common law, that it may be varied as may seem meet to the Judge from the change of circumstances, and thence shewing that the wife cannot have the power of disposition of specific things. No doubt the Court is not restricted to a provision out of the income, though that is the usual mode of making it. A sum *in numero* may be decreed to be paid annually, and the husband's estate may, under the 10th section, be sold to make it. The circumstance, therefore, that the specific property may not yield adequate profits, cannot be taken into consideration in interpreting the act, as it is in the discretion of the Judge to assign property or a pecuniary allowance. There is another consideration arising out of the statute of distribution, which is strongly opposed to the argument for the defendants. Upon the intestacy of a husband, or the wife's dissent from his will, she is entitled to dower of one-third of his land, and to a child's part of his clear personal property. Now, the Court can, without regard to the number of children, assign the third of the real and personal estate as alimony, and might in some instances be the more inclined to assign a full third to her when the children are numerous, that she might keep house and provide nurture for the children, whom the father neglected duly to maintain. This is all very well, if alimony determines with the death of either party. But if an absolute property enures to the wife in the things assigned for alimony, her share of the estate, instead of being a child's part, might be thus made four or five times as much, and thus defeat the statute of distributions; which likewise could never have been intended.

The true principle therefore is, that as the separate enjoyment of the specific things is given as alimony, in lieu of money, it can endure only as long as an allowance in money would. There is no more reason for holding that the wife's right to the negroes was absolute, than that one-third of the rent of the real estate should be paid to her *in perpetuo*. Her right is, by its nature and the terms of the statute, limited to the period of separation of the husband and wife, and it terminates by the death of either.

PER CURIAM. Judgment affirmed.

BENJAMIN WALL *vs.* ALEXANDER NELSON.

A Justice of the Peace has no jurisdiction of a question of guaranty. The case of *Adcock* v. *Fleming*, 2 D. & B. 470, cited and approved.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

The following is a statement of the case.

This was a warrant, which came up, by successive appeals, to the County and Superior Courts. The plaintiff declared upon a parol contract. For the purpose of proving the contract, he introduced a witness, who testified that he was present when the plaintiff sold a negro to the defendant, that, when the money was paid, the plaintiff remarked, "I suppose it is good," to which the defendant replied, "Yes, if it is not, I will make it good." He further stated, that a part of the money paid was a bank note for ten dollars, issued by the Alabama and Mississippi Rail Road Company at Brandon; and he testified that the note produced on the trial was the same note. It was further proved, that Nelson said in conversation,

that he had heard of this note before, and said that he understood that he had been threatened with a warrant, but that he had not passed it, and knew nothing about it, and would not take it back. This conversation took place before the plaintiff sued out his warrant. The constable proved that he tendered back the note to Nelson, before or after he served the warrant, but could not recollect which. It was in proof, that the note, though a genuine bill in the opinion of the witnesses, was uncurrent and of no value here, though it was not proved that it was of no value in Mississippi or Alabama. It was insisted in argument by the plaintiff's counsel, that he was entitled to recover on the original contract of sale, there being, as to this ten dollar note, no payment at all; and that, if this was not so, it was a contract to guarantee, not only that the bank notes were genuine, but that they were current, and that there was evidence of notice and demand from the defendant before the commencement of this warrant. It was insisted by the defendant's counsel that the true meaning of this contract was, that the notes were genuine and not counterfeit, and truly due and owing from the bank, which had issued them; and not a contract of guaranty, that they were current or of par value. It was further insisted, that before the plaintiff was entitled to any action whatever, it was necessary to prove a demand, and a refusal on the part of the defendant, to take back this note, and give other money in the place of it. It was further insisted, that inasmuch as this was a contract to guarantee the notes and sounded in damages, it was one of which a magistrate had no jurisdiction. The question of whether a Justice of the Peace had jurisdiction of the subject was reserved, with an understanding, that if the Court should be of opinion that he had not, a non-suit should be entered. The Court charged the jury, that if the defendant passed the note to the plaintiff and promised to make it good, and they were satisfied from the testimony that it was of no value, they should

find a verdict from the plaintiff, provided, a tender of the note had been made by the plaintiff before suit was broughf, and there was evidence of a tender. The jury, under this instruction, returned a verdict for the plaintiff, and upon the question reserved, the Court set aside the verdict, and entered a non-suit. From which the plaintiff prayed an appeal to the Supreme Court, which is granted.

A. Moore, for the plaintiff.
No Counsel in this Court for the defendant.

Daniel, J. *First*—if the ten dollar bank note in question had been totally worthless, and that fact had been known to Nelson and unknown to Wall, the passing it would have been a clear fraud on the part of Nelson; and the original balance of the price of the slave sold by Wall to Nelson, would still remain due; but upon this point the plaintiff made no proof.

Secondly—if the note was worthless, at the time it was passed, from the total insolvency of the bank, and the defendant was ignorant of that fact, did it operate as a payment of the debt, to the amount mentioned in the face of the bank note? It seems that the plaintiff failed to make any such proof as would entitle him to call for the decision of the Court upon this point, attempted to be raised in the Court below.

Thirdly—whether the defendant had guaranteed the goodness of the note here (that is, in North Carolina)? The Court left it to the jury to determine the fact, subject to the question, whether a Justice of the Peace had jurisdiction of such a case. The jury found for the plaintiff upon the guaranty. The Court, after consideration, set the verdict aside and entered a non-suit, because a single Justice has not jurisdiction of a guaranty like this. The plaintiff then appealed. This Court has several times decided, that an action, upon a promise of a guaranty, was not within the jurisdiction of a single

magistrate. *Adcock* v. *Flemming*, 2 Dev. and Bat. 470, and cases there cited.

The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM BENBURY *vs.* BURTON W. HATHAWAY.

Where an action of tort is brought against the owner of a vessel for not delivering a cargo entrusted to him, an alteration by the plaintiff in the bill of lading, in which there had been a mistake, does not in any degree affect his right to damages.

Appeal from the Superior Court of Law of Chowan County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

The facts of the case are fully stated by the Judge delivering the opinion of the Supreme Court.

A. Moore, for the plaintiff.

Heath, for the defendant.

NASH, J. This was an action on the case, and the declaration contained two counts, one in Trover and the other in Tort for negligence.

This case is, the defendant was owner of a vessel, on board of which the plaintiff shipped six hundred and fifteen bushels of corn, to be delivered in Norfolk to his agent, for which the consignor was to pay an agreed freight. The agent or consignee was no further instructed, than to receive and sell the corn, and pay over the proceeds to the plaintiff. The agent of the defendant, who received the corn on board the vessel, gave a bill of lading, and, through mistake, stated the quantity to be

eight hundred bushels. This mistake was rectified by the plaintiff, in the absence of the defendant, by striking out the quantity mentioned in the bill of lading, and inserting the true amount. The day after the corn was received, the vessel sunk—and the corn having been gotten up by the defendant, was by him sold in its damaged state. The action is brought to recover the value of the corn, at the place of shipment.

On the part of the defendant, it was contended, that the plaintiff could not recover, in consequence of the alteration by him, in the absence of the defendant, of the bill of lading, whereby it was destroyed; and his counsel requested the presiding Judge so to instruct the jury. This he declined to do, but charged them, if the alteration was made in good faith—to make the bill of lading speak the truth, it was not thereby rendered void, and the plaintiff was entitled to a verdict. It is not necessary for us to express any opinion of the correctness of this proposition of his Honor. The question on the alteration of the bill of lading, did not arise in the case. The action is brought, not on the contract, but in Tort. The bill of lading was no further of importance, than to show that the corn had been received by the defendant; and the case states, that such was the fact. The injury to the corn is not controverted, nor is it questioned, that, by the law, the defendant is answerable in damages. The only point sent to us is as to the alteration of the bill of lading. In this case, it is entirely unimportant. The plaintiff could maintain his action, and was entitled to his verdict upon his proofs, independent of the bill of lading.

Per Curiam. Judgment affirmed.

THE STATE vs. JEFFERSON, A SLAVE.

On a trial for rape, the prisoner may give in evidence that the woman had been his concubine, or that he had been suffered to take indecent liberties with her.

But he cannot give in evidence, to prove her a strumpet, that she had had criminal connection with one or more particular individuals. It is a question of character and the evidence, as in other questions of character, must be of a general nature.

On a trial for rape, the acts and declarations of the husband of the woman, on whom the offence is alleged to have been committed, are not admissible to discredit the wife, examined as a witness.

A confession, made by a prisoner, while in prison, is evidence against him, provided it be the prisoner's own act, not unduly obtained by promises or threats.

Appeal from the Superior Court of Law of Mecklenburg County, at the Spring Term, 1846, his Honor Judge CALDWELL presiding.

The following are the facts, so far as relates to the questions of law submitted to this Court.

The prisoner, a slave of one Wallace, was convicted of a rape upon one Elizabeth C. Rogers, a white woman. On the trial she was a witness, and proved the offence fully. On the part of the prisoner, it was admitted that he had connexion with the woman; but he alleged that it was by her consent, and that there had been a previous criminal intimacy between them. In order to establish it, the prisoner offered to prove by a witness, that, on a certain night, some time before the alleged rape, he and the prisoner went from Wallace's towards the residence of Harvey Rogers, the husband of Elizabeth C. Rogers, and that after having gone together some distance to a neighbor's house, the witness stopped, and the prisoner went on; and after having been absent some time, the prisoner returned and told the witness that he had been to the house of Rogers, who was from home, and had been admitted by his wife. Upon objection from the Solicitor for the State, the Court rejected this evidence.

After an answer in the negative to a question put to Mrs. Rogers on her cross-examination, whether she had not allowed the prisoner to put his hands on her in a free and familiar manner, it was proved by another slave of Wallace, on the part of the prisoner, that he had frequently seen the prisoner treat her in that manner. And the prisoner offered further to prove that the witness, Rogers, had permitted other negro men to kiss her and take other liberties with her. But upon objection by the Solicitor, the Court rejected this latter evidence also.

The prisoner offered further to prove, that Harvey Rogers, the husband, had in the presence of his wife offered to compound this prosecution with Wallace, the owner of the prisoner. But the Solicitor objected to this evidence, and the Court refused to admit it.

It was then proposed, on the part of the State, to give in evidence the confession of the prisoner; and, for that purpose, one Springs was examined. He stated that on one occasion, after the prisoner had been committed to jail on this charge, he saw the prisoner and asked him to whom he belonged, and why he was in prison; to which the other replied, that he belonged to Wallace, and was in jail for a rape on Mrs. Rogers. The witness, having heard something of the case, then said, "Yes, I have heard of you; and it is said you choked her, and had your will of her;" and the prisoner answered, that he did. The witness said that he then asked the prisoner why he did so, and the latter replied, that he supposed he must have been drunk; and that to the question from the witness, "Did you know it would hang you?" the prisoner replied that he did not. To this evidence, the counsel for the prisoner objected; but the Court received it.

After sentence of death upon conviction, the prisoner appealed to this Court.

Attorney General, for the State.

Alexander and *J. H. Bryan*, for the defendant.

RUFFIN, C. J. Upon all the questions of evidence, the ruling of his Honor was, in the opinion of this Court, right. It was not competent to establish that the woman was the prisoner's concubine, or any fact from which that relation might be inferred, merely upon the prisoner's own declaration of it, and especially when the declaration refers to a period and act different from those which enter into the particular offence charged in the indictment. A person cannot thus make evidence for himself.

That familiarities had occurred, indicative of habitual criminal connexion between those persons, as proved by the prisoner's fellow servant, was properly left to the jury, as tending to disprove the probability of the use of force or fear by the prisoner, and to discredit the witness for the State. No doubt, too, that it would have been proper to receive evidence, that the woman was a strumpet, upon similar grounds; and particularly, that she had illicit intercourse with other negroes. But that ought only to be done upon general evidence: for it is a question of character, and, as in other cases when that question arises, it would be a complete surprise, if particular instances of such familiarity with a certain person, or with certain persons, were received as evidence to establish the character. The point, indeed, is not new, but was so ruled in a case of this sort by eight Judges in 1811, *Hodson's case*, Russ and Ry. 211; and was held also in *Rex* v. *Clarke*, 2 Stark. Rep. 241.

The offer of the husband to compound the prosecution was irrelevant, and therefore calculated only to mislead; and was properly rejected. His motives for instituting the prosecution, if he did so, which is not stated, may not have been good; but that does not tend to shew that she was not credible, or that the facts were not as she had sworn they were. The husband's acts and delarations are not evidence to discredit the wife. It is said, however, that the offer was made in her presence, and that as she did not object, she is to be taken to have assented

to it. But it is plain, that she had no right nor power to interfere in the matter, and that her assent or dissent could avail nothing. If the husband had undertaken to state the facts as they occurred, or as they had been stated to him by his wife, and that statement had varied from the evidence given by her. and she suffered it to pass without notice and correction, it would have been proper evidence to contradict and discredit her. He did not, however, profess to relate the facts at all, but merely offered to compound the prosecution: which he might have done, as well if it was instituted for acts committed by the prisoner, as if it were for acts falsely imputed to him by the wife. The evidence is too slight and vague to found any just suspicion of a conspiracy between the husband and wife, to prosecute the prisoner upon a false accusation—since there is nothing but the silence of the wife on a point, in which she had in law and fact no control over her husband.

The confession of the accused freely made is evidence against him; and, as far as appears, this was of that sort. There was no attempt to shew that Springs induced the prisoner to make it by any impression of hope or fear; nor even a suggestion that such an impression had been previously made on him by any person, from the influence of which this might have proceeded. All that is in the case are the circumstances that the prisoner was in jail when he confessed, and that he said he was not aware of the punishment inflicted by the law for that offence. But there is no doubt, that a confession made in prison is evidence, provided it be the prisoner's own act, not unduly obtained by promises or threats. And, certainly, a confession cannot be deemed the less voluntary, or the less to disclose the truth, because the person was not under the temptation to conceal or misrepresent the facts, which a knowledge, that the offence was capital, might have produced. If, indeed, the prisoner had been deceived on that point by the witness, it would be different: as that would really

be obtaining the confession by falsely exciting an unfounded hope and belief. But the mere fact that the prisoner was not aware of the degree of his crime and therefore, was not aware of all the consequences that might ensue from the confession, is no objection to using it; for it affords no presumption, that it was not a voluntary act of the prisoner, or that he may have accused himself therein of some things of which he was innocent.

Upon the whole, nothing is found in the exceptions or record, on which the judgment ought to be reversed; which must be accordingly certified to the Superior Court.

PER CURIAM. Ordered to be certified accordingly.

JAMES W. DOAK *vs.* THE BANK OF THE STATE.

A pledge of personal property, as for example, a pledge of Bank stock, differs from a mortgage, and is not included within the words or meaning of the Registry Act.

A mortgage is a pledge and something more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time.

A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation to be a lien on it.

Generally speaking, a bill in Equity to redeem will not lie in behalf of a pledger, or his representatives, as his remedy is at law upon a tender of the money.

Per NASH, J. The Legislature clearly recognized this distinction between mortgages and pledges of property, for the payment of debts to Banks, in the Act chartering the Cape Fear Bank in 1804, and in the Act chartering the Merchants' Bank of Newbern in 1834.

Per RUFFIN, C. J. The stock in the Bank, pledged in this case, was not tangible property, subject to execution, and therefore did not come within the words or meaning of the Registry Act, nor within the mischief intended to be prevented by the Legislature in directing incumbrances on property to be registered. Pledges of personal property, tangible to legal process, are as much within the Act as mortgages or deeds of trust.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term, 1845, His Honor Judge DICK presiding.

This was an action of Assumpsit, in which the plaintiff declared upon the following counts, to wit:

1st. James W. Doak, who sues to the use of Peter Adams, complains of the corporation known as "The Bank of the State of North Carolina," for that whereas one Dan Alexander, on the day of , 1840, was possessed, in his own proper right, of one hundred shares of capital stock in the said corporation, and, being so possessed, he, the said Dan Alexander was arrested by a writ of *capias ad satisfaciendum*, at the suit of Peter Adams, returnable to the Spring Term of the Superior Court of Law for Guilford County, begun and held at Greensborough, on the 3d Monday after the 4th Monday in March, 1841, when and where, designing and intending to apply to the said Court to be allowed the benefit of the Act of the General Assembly of North Carolina, passed for the relief of insolvent debtors, the said Dan Alexander, afterwards, to-wit, on the 29th day of March, 1841, filed in the office of the Clerk of the said Court a schedule of his property and effects; and afterwards, to-wit, at the Term of the said Superior Court of Law, begun and held, &c. on the 3d Monday after the 4th Monday of September 1841, filed an amended schedule of his property and effects of every description, by the filing of which schedule and amended schedule, the interest of the said Dan Alexander in the one hundred shares of capital stock aforesaid was surrendered to, and became vested in the said James W. Doak, who was then and still is Sheriff of Guilford County aforesaid, for the use and benefit of all the creditors of him, the said Dan Alexander's creditors, according to the provisions of the Act of Assembly in such cases made and provided, and the said Dan Alexander having, as aforesaid, filed his said schedule and amended schedule, and made thereby a surrender, as aforesaid, for the purpose aforesaid, of all his property and effects, including the said one hundred shares in the capital stock in the corporation aforesaid, was afterwards,

to-wit, at the term of the Court aforesaid, on the 3d Monday after the 4th Monday of September 1841, by the said Court allowed to take the oath by law prescribed for the relief of insolvent debtors, and was then and there discharged, according to the form and direction of the Act of Assembly in such case made and provided, by virtue of which said surrender and discharge, and by virtue of the said Act of Assembly, the said James W. Doak, Sheriff as aforesaid, became entitled to the said one hundred shares of capital stock in the corporation aforesaid, for the benefit of the creditors of the said Dan Alexander, and to have the same transferred to him upon the books of the said corporation; but the said corporation afterwards sold and transferred the said shares of capital stock to other persons, to the plaintiff unknown, and received to its own use the money arising therefrom; whereby the said corporation became liable to account to the plaintiff for the sum of money so received, which sum of money the plaintiff avers to be the sum of $10,746 8-100; and, although the said corporation is so liable, and, on the day of the sale and the transfer of the stock aforesaid, at Guilford aforesaid, did promise to account with the plaintiff for the sum so received as aforesaid, yet disregarding, &c. though often requested, hath refused, &c. (concluding in the usual form.)

2d count—After the same premises. And that, by reason of the premises aforesaid. the said corporation became liable to transfer the said one hundred shares of capital stock to the plaintiff, for the use and benefit of the creditors of the said Dan Alexander, he, the said plaintiff, so being the Sheriff of Guilford County as aforesaid, and, being so liable, the said corporation afterwards, to-wit, on the day of 1841, at Guilford aforesaid, undertook and promised the plaintiff, as Sheriff aforesaid, to transfer to him the stock aforesaid, when the said corporation should be thereunto requested, which said shares of stock the plaintiff avers to be of the value

of $10,746 8-100, and, though afterwards, to-wit, on the day of , the said corporation was requested by the plaintiff to transfer to him the said shares, &c. yet, disregarding, &c. it refused so to do, (with the common conclusion.)

3d count—After reciting the premises as before—charged the defendants with the amount of the proceeds of the sale of the stock, as so much money had and received to the use of the plaintiff, (concluding in the usual form.)

To this declaration, the defendants entered the pleas of "The general issue, payment and set off," and issue was joined.

By consent of the parties, a verdict was rendered for the plaintiff for the sum of $10,695—subject to the opinion of the Court upon the following case.

The plaintiff declares against the defendants in assumpsit in three counts; and, on the trial, proved, that on the 21st of March, 1841, Peter Adams brought suit in this Court against one Dan Alexander, and at the Fall Term, 1841, obtained judgment in his said action for thirty-seven hundred and fifty dollars debt, and four hundred and sixty-one dollars and fifty cents damages, besides costs, &c: That the said Adams sued out, upon his said judgment, a writ of *capias ad satisfaciendum*, returnable to the Spring Term of the said Court, on which the said Dan Alexander was arrested and gave bond for his appearance at the said Term, to take the benefit of the statute for the relief of insolvent debtors; and on the 29th of March, 1841, filed in the office of the Clerk of the Court, a schedule of his property and effects, according to the said statute, in which (among other things) was included this entry "one hundred shares in the Bank of the State of North Carolina, pledged to the said Bank for the payment of ten thousand five hundred dollars due by said Dan Alexander:" That, at the Fall Term, 1841, of said Court, the said Dan Alexander obtained leave to amend

his schedule, and in the schedule filed the 23d of October, 1841, under the said leave, was this entry, "One hundred shares in the Bank of the State of North Carolina:" that, the said amended schedule being filed, the said Dan Alexander was duly admitted to take the oath, by the said statute in such case prescribed, and was by judgment of the said Court then and there duly discharged according to the said statute; and it was also adjudged that the property, effects, debts, claims, and choses in action in the said schedule mentioned, should be vested in the plaintiff, Doak, Sheriff of Guilford, for the purposes and intents in the statute declared. And the plaintiff further proved, that, on the 6th of December 1841, Charles Dewey, under a power of attorney from the said Dan Alexander, dated the 16th November 1841, sold the said one hundred shares of stock for the sum of $10,695, and directed the agent of the Bank at Charlotte to apply the same to the indebtedness of the said Dan Alexander to the Bank, as the same was reported to him by the said agent, and that the same was applied to the use of the Bank accordingly. And here the plaintiff stopped his proof.

The defendants then proved, that, on the 9th of September 1839, the said Dan Alexander was indebted to the defendants, at their office in Charlotte, in several notes, amounting in the whole to nine thousand nine hundred and seventy-seven dollars, and on that day gave his bond for the said sum, payable eighty-eight days thereafter, secured by a pledge of the said one hundred shares of stock, the original certificate of which he then deposited with the Agent of the Bank at Charlotte, and made a power of attorney attached to the said bond, authorizing the said Agent as his attorney to sell the said stock, in order to pay the said bond, should it not be paid otherwise; a copy of which said bond and power is attached, marked (A), as part of this case. The defendants further proved that the said bond was not paid at maturity, but that, on the 6th of January 1841, the same was

renewed in full by the said Alexander giving a new bond, payable eighty-eight days after date, for the same sum, on the pledge of the same stock and renewal of the power; a copy of which said bond and power marked (B) is hereto annexed, as part of this case: That the said bond was not paid or renewed at maturity, and, the same remaining wholly unpaid, the said Dan Alexander on the 16th of November, 1841, made the power of attorney herein before mentioned, authorizing the said Charles Dewey to sell the said stock, who accordingly made the sale, as already proved. A copy of which said power of attorney marked (C) is hereto annexed as a part of this case. And the defendant further proved, that the said Agent at Charlotte, having received on the 9th of December Dewey's account of the sale, and directions thereupon, he on that day applied ten thousand and three hundred and seventy-five dollars and eighty cents ($10,375 80) to the payment of the principal and interest then due on the bond for which the stock was pledged, and deposited the residue of the proceeds of the sale of stock $371 to the credit of the said Dan Alexander. And the said defendants further proved, that in July, 1839, one Wm. F. Alexander was indebted to the Bank by a note at Charlotte for $700 with the said Dan Alexander as surety: That the said Dan Alexander had assumed to pay the said debt, and had, by sundry payments, made between July 1839, and August 1841, reduced the same to $371, for which a note of said Dan Alexander was given, payable in November afterwards: that on the 15th December 1841, the said Dan Alexander applied in person at the agency at Charlotte, drew a check for the sum of $371, so deposited to his credit, received the money and then applied it to the payment of the said note of $371, which was thereupon delivered up to him by the said agent.

Upon these facts the defendants contended, that the plaintiff was not entitled to recover, (amongst other reasons) because the facts proved did not support his decla-

ration; because, as to the debt for which the stock was pledged, the said Dan Alexander had therein no interest at the time of the schedule, except a right to the stock on payment of the debt, or to the surplus of the sale after paying the debt, and no other right could or did pass to the plaintiff therein: That, as to the surplus, the plaintiff could not recover, because the same was rightfully deposited to the credit of the said Dan Alexander, and neither the defendants nor their agent having any notice whatever of the filing of the schedule or other proceedings on or before the 19th of December, 1841, the same was rightfully paid to him and properly received in payment of the said note, which was then *bona fide* surrendered to him:

And that the plaintiff could not recover for want of notice to and demand, upon the defendants, before the bringing of the action.

On the contrary, the plaintiff contended, among other things, that the proceedings upon the *ca. sa.*; the schedule, and the judgment, having taken place in a Court of record, having legal cognizance of the case, constituted notice to all the world, and the defendants were affected thereby: That the stock, when sold, was the property, not of Dan Alexander, but of the plaintiff, and the powers of sale made by the said Alexander were in law revoked, and hence the proceeds of the sale belonged wholly to the plaintiff. And also that, as to the surplus which was not pledged, it was an illegal act of the defendant's agent, for which they were responsible, to allow the said Alexander to apply it to a debt of the defendants, for which the defendants had no lien on the stock whatever.

And thereupon, it was agreed by the parties that the foregoing verdict should be entered for the plaintiff, for the whole amount of the sale and of interest thereon from the time of sale, subject to the opinion of the Court upon the whole case, the sufficiency of the declaration, and the proof to support it, and of the rights of the parties upon the foregoing facts.

And it is agreed, that should the Court be of opinion that the plaintiff is not entitled to recover at all, then the judgment shall be entered for the defendants. But if the Court shall be of opinion that the plaintiff is entitled to recover. then judgment is to be entered for the plaintiff, either for the whole amount found by the jury, or for any other and lesser sum which the Court shall think the plaintiff entitled to. Signed, "Jno. Kerr, for plaintiff; Geo. E. Badger, for defendants."

Upon the foregoing verdict, his Honor being of opinion that the plaintiff is entitled to recover the sum of $371 with interest from the 13th December 1841 thereon, and no more, it is considered by the Court that the plaintiff recover the said sum, and have execution therefor. With which judgment both plaintiff and defendants being dissatisfied, prayed an appeal to the Supreme Court, which was granted, security for the same being waived by both sides.

(A)

Eighty-eight days after date, I promise to pay John J. Blackwell, Agent, &c. or order, nine thousand nine hundred and seventy-seven dollars, for value received, negotiable and payable at the Agency of the Bank of the State of North Carolina at Charlotte; and to secure the payment thereof, I have pledged one hundred shares belonging to me in the capital stock of said Bank, contained in certificate No. 207, issued in my name for one hundred shares, which certificate I have lodged with the Agent aforesaid, whom I hereby appoint my lawful attorney to sell and transfer said stock in case of failure of payment. In witness whereof, I have hereunto set my hand and seal this 9th day of September, A. D. 1840.

DAN ALEXANDER. [SEAL.]

$9,977. (B)

Eighty-eight days after date, I promise to pay to John J. Blackwood, Agent, &c. or order, nine thousand nine

hundred and seventy-seven dollars for value received, negotiable and payable at the Agency of the Bank of the State of North Carolina at Charlotte; and to secure the payment thereof, I have pledged one hundred shares, belonging to me in the capital stock of said Bank, contained in certificate No. 207, issued in my name for one hundred shares; which certificate I have lodged with the Agent aforesaid, whom I hereby appoint my lawful attorney to sell and transfer said stock in case of failure of payment.

Witness my hand and seal this 6th day of January 1841.

DAN ALEXANDER. [SEAL.]

(C)

Know all men by these presents, that I, Dan Alexander, of the County of Mecklenburg and State of North Carolina, do hereby constitute and appoint Charles Dewey, Esq. of the City of Raleigh, my true and lawful attorney to sell and transfer one hundred shares belonging to me in the capital or joint stock of the Bank of the State of North Carolina, contained in certificate No. 207, issued in my name, and for that purpose to make and execute all necessary acts of transfer and assignment, and to pay over the amount of such sale of stock to the Agent of the said Bank at Charlotte, North Carolina, to be applied by said Agent to the discharge of my indebtedness to said Bank.

This power is made in furtherance of one for the same purpose, dated 6th January last, appointing J. J. Blackwood my attorney.

In witness whereof, I have hereunto set my hand and seal, this 16th day of Nov. 1841.

DAN ALEXANDER. [SEAL.]

Test: T. M. ALEXANDER.

Kerr, for the plaintiff.

Badger and *Morehead*, for the defendants.

DANIEL, J. The plaintiff, as the assignee in law of all the effects, mentioned in the schedule of Dan Alexander, an insolvent debtor, dated on the 21st day of October, 1841, has brought this action of assumpsit against the Bank, to recover the amount of money, which the one hundred shares of bank stock, mentioned in the said schedule, produced on the sale thereof, made by C. Dewey, and by him placed in the possession of the bank. The plaintiff declares, that the bank had and received the said sum of money to his use. The bank, under the plea of *non assumpsit*, resists the demand of all or any part of the monies so paid in by Dewey. *First*, because D. Alexander, before the date of the assignment of his effects to the plaintiff, to-wit, on the 6th day of January, 1841, had pledged the said stock to one Blackwood, its agent, as collateral security to satisfy a debt of $9,977, then owing by him to the said bank. And *secondly*, that D. Alexander gave a check for $371 dated on the 15th day of December, 1841, to apply so much of the money then standing in bank to his credit, to the satisfaction of a debt to that amount, which he then owed the said bank; and that the same had been applied accordingly, without any notice at the time to the bank, that Alexander had, before the date of the check, taken the benefit of the insolvent law in Guilford Superior Court. The evidence of the pledge to the bank of the aforesaid stock is to be found in the two deeds described in the case, by the letters A. and B. The plaintiff insists, that these two deeds are void as to him, by force of the act of assembly, (*Rev. St.* c. 37, *s.* 24) because they have never been registered. The answer to this objection is, that the statute only declares, that deeds of trust and mortgages shall not be valid against creditors or purchasers, but from the registration. The instruments, marked A. and B. are certainly not deeds of trust, and we think that they are not mortgages: they are, what they profess on their face to be, pledges of stock to secure the payment of the debt

therein mentioned. A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer, until the debt is paid. A mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it. *Jones* v. *Smith*, 2 Ves. Jun. 378, 4 Kent's Com. 138 (3 edit.) 2 Story's Eq. 227. Generally speaking, a bill in equity to redeem will not lie, in behalf of a pledger or his representatives, as his remedy is at law, upon a tender of the money. 2 *Story's Eq.* 298, 1 *Ves.* 298. We see that there is a very marked difference between a mortgage and a pledge of personal property; and, as the Legislature has not said, that pledges, to be good against creditors and purchasers, must be registered, neither can we declare them to be within the meaning and operation of the aforesaid registry act. We cannot tell, but what the Legislature designedly left pledges out of the act. It seems to us, therefore, that the deeds A. and B. are made at the common law, and do not require to be registered to give them effect. The receipt by the bank of so much of the proceeds of the sale of the said stock, as was necessary to satisfy the debt, for which the stock had been pledged, had been received, not to the use of the plaintiff, but to the use of the Bank.

Secondly. The $371, standing in Bank to the credit of D. Alexander, was legally assigned to the plaintiff, before the date of the check given by Alexander to the Bank for that money. The Bank alleges, that it had no notice of this assignment to the plaintiff, when the check was received and applied in extinguishing D. Alexander's

debt to that amount then in Bank. The answer to this allegation is, that a plea of a purchase for a valuable consideration, without notice, is not available against an adverse legal title to the thing, either in a Court of Law or Equity. It is very plain, that the stock was sold by Dewey and the purchase money received by the Bank with the assent of Alexander, Blackwood, and the Bank; and that the sale of the stock and receipt of the purchase money were legally made, are facts obliged to be admitted by the plaintiff, before he can be permitted to rely on either the first or third counts in his declaration. But, to whose use the money was had and received by the Bank, is the question now to be decided. There was no evidence in the case, applicable to the second count, even if *assumpsit* could be maintained against the Bank, for refusing to transfer stock to a purchaser of it. We are of opinion, upon an examination of the whole case, that all the money received by the Bank, over and above the sum necessary to satisfy the debt and interest mentioned in the deed marked B, was money had and received to the use of the plaintiff, and no other sums of money. The check given by Alexander, transferred to the Bank no title to the money which was standing there in his name, because it had in law been assigned to the plaintiff before the date of the check. We think that the plaintiff was entitled to recover this money under the third count in the declaration.

We find no authority that a demand was necessary before the plaintiff could sustain his action; this objection, taken by the defendant, is therefore over-ruled.

Nash, J. The proceeds of the sale of the stock are claimed by the plaintiff, upon the ground that the transfer to the Bank was void, because the deeds or bonds of Sept. 1839, and Jan. 1841, were not proved and registered, agreeably to the provisions of the Act of Assembly, *Rev. Stat. ch.* 37, *s.* 23, 24.

I agree with my brother DANIEL, that the deeds or bonds, under which the defendants claim the proceeds of the stock, are valid at common law, and need not be registered to give them effect. I cannot see that the transaction came within the meaning of the Act referred to, and certainly not within its words. The transfer of the stock by Alexander to the Bank was neither a mortgage nor a deed, or conveyance in trust, but was simply what it purported to be, a pledge of the stock. The difference between a mortgage and a pledge, strictly as such, is well known and recognized by the most approved writers. The passages from "Story's Equity," referred to in Judge DANIEL's opinion, fully prove it. A mortgage conveys the entire property in the thing mortgaged conditionally, so that, when the condition is broken, the property, at law, remains absolutely in the mortgagee; but a pledge never conveys the general, but only a special property, to the bailee; and the effect of a failure on the part of the pawner, to pay the money for which it is pledged, is not to convey the entire property in the thing to the bailee, but to give him a power to dispose of it and pay himself. If he does not do so, but retains the property, the pawner at any time has a right to redeem it. If the debt is paid or the money tendered by the pawner, it is the duty of the bailee to return the thing pawned, and, if he does not, an action at law lies against him, as the whole property is re-vested thereby in the pawner. *Jones on Bail, p.* 91. So, also, it is essential to a pledge, that the possession of the article should accompany it. My opinion, however, is not, in this case, formed so much upon the difference between a mortgage and a pledge, as upon the nature of the property here put in pawn, namely, the certificate of stock: a mode of securing debts to the Bank, known to the Legislature and sanctioned by them. In the Act chartering the Bank of Cape Fear, *2d vol. Rev. St. s.* 8, *p.* 40, in pointing out in what things the corporation shall be permitted to deal, the Act enumerates, "or in the sale

of goods really and truly pledged for money lent and not redeemed in due time." This Act was passed in 1804. The charter of the Merchants' Bank of Newbern was granted in 1834, *2d vol. Rev. St. p.* 69. In the 5th sec., among the fundamental articles of the corporation, it is provided, "In all cases, in addition to the usual personal security, the stock of directors shall be considered as a pledge, for the re-payment of the money they may borrow, either as principal or security." And there is the same restriction as to subjects in which they shall deal, as in the charter of the Cape Fear Bank, expressly including articles *pledged*. The acts concerning mortgages, to which reference has been made, were passed in 1820 and 1829. Both before and after the passage of these acts, the Legislature recognized the right of the Banks to receive in *pawn* or *pledge*, its own stock as collateral security for money loaned; it is to be received not in mortgage, or in trust, properly speaking, but in pledge, and subject, of course, to the laws regulating pawns. Nor can any evil possibly result from such an arrangement, to any creditor of the pawner, for the certificate of stock must, in every instance, accompany the transfer, to make it effectual. I cannot therefore persuade myself that the Legislature intended to embrace within its provisions, upon the subject of mortgages and deeds of trust, such a transaction as this.

I concur with my brother DANIEL in affirming the judgment.

RUFFIN, C. J. I concur in the opinion, that the judgment should be affirmed. I think a pledge of stock in a corporation, or in the public funds, or of securities for a debt, whether by parol or in writing, is not within the act, which requires deed of trust or mortgages of estates to be registered, in order to give them validity. It is, neither in form or substance, within the language of the act, nor within the mischief which it sought to suppress.

Had it pleased my brethren to allow the cause to be decided on this point—and it is the only one which is necessary to its decision—the judgment might, as far as I am concerned, have been entered, immediately after the argument at the last term. But they have thought it proper not to confine their opinion to the facts of this case, and hold that a pledge of *stock* is not within the act, but place their judgment upon broader ground, that all *pledges*, whether of stock, choses in action, or *specific articles*, are without the act. In that part of their opinion I did not agree; and, with a view to a fuller consideration of the question, the case was left under advisement. But we have come no nearer together than at first, and it now becomes my duty to give the reasons for my opinion.

The act of 1829, c. 20, is entitled "an act to prevent fraud in deeds of trust and mortgages;" and it enacts, "that no deed of trust or mortgage, for real or personal estate, shall be valid to pass any property as against creditors or purchasers from the donor or mortgagor, but from the registration of such deed of trust or mortgage, in the County where the land lieth, or, in case of chattels, where the mortgagor resides or the chattels are situate." My brethren say, that a pledge or power is not mentioned in the act, but only deeds of trust or mortgages, and that there are certain known differences between a pledge and a mortgage of chattels; and therefore, the Legislature may have designedly left out pledges, and, at all events, that the Court cannot construe the act as if they were in it. It is plain, that the argument is merely verbal, turning upon the particular term "mortgage" and having no regard to the mischief within the purview of the act, nor the means intended to suppress it. But that is not the principle of the construction of *remedial* statutes, or those to prevent *fraud*. To stick to their letter is sticking in the shell and losing the kernell.

They are to be liberally construed, in order to defeat fraud, prevent artful shifts and evasions, and protect fair

dealers, and advance their remedies. I need not quote authority for that position. It is a maxim in the law, and my is to mind decisive of this question. I do not dispute the distinction between pledges and mortgages, which are mentioned; though, in modern times, Courts of Equity have not hesitated to give relief on pledges, as if they were pure mortgages, upon the ground, that they were but securities for debt and that the rights of the parties may involve an account. Certainly, in this State, in the instance of the most valuable of our chattels, namely, slaves, bills for redemption or foreclosure have been constantly entertained, as well when the slave was pledged, by being put in the possession of the lender of the money without a written conveyance, as when there was in terms a mortgage proper by deed. But, let it be admitted that all those distinctions do fully subsist at the present day, still they are differences in no degree material to the purpose which we are now considering, namely, the reason why the Legislature requires mortgages to be registered, and to what conveyances or contracts those reasons extend. The object of the law was to prevent fraud, and to that end to require *all encumbrances upon tangible estates* to be registered, that purchasers and creditors might have notice of their existence, nature and extent. It mentions "deeds of trust" and "mortgages," but it is not satisfied by applying it only to conveyances, which are, *technically* and *in form*, deeds of trust or mortgages. The intention of the Legislature can be fulfilled, only by including within the scope of the Act, all other conveyances, which the parties intended to have the same effect as if they were "deeds of trust" or "mortgages" upon their face; in other words, were meant to be *securities for money*, and between the parties are but securities. If the construction is to be narrowed down, so as to make it turn on the word "mortgages," and not include "a pledge," because a pledge is not a mortgage; why, for the same reason,

an absolute deed, with a separate parol agreement for a reconveyance or redemption is not within the Act, since that is not upon *its face* a "mortgage," but is only held by a Court of Equity to be a security in the nature of a mortgage. Accordingly, in the first case that arose under the encumbrance registry acts, that of *Gregory* v. *Perkins*, 4 Dev. 50, it was held, that the necessary construction of the act of 1820, by which instruments, which in themselves are deeds of trust or mortgages, were required to be registered within six months, was to avoid deeds which were intended to be securities, but do not profess upon their face to be so. The Court said, "it is not surprising, that, with the experience of the evils of secret liens and pretended encumbrances, the Legislature should require, when the contract, in its terms, creates *an encumbrance*, that notice should be given of it, that other persons may know how to deal with the former owner. For the like reason, and as a necessary consequence, when nothing but *an encumbrance* was meant, the parties must frame the evidence of their contract accordingly. In the former case, (that is, where there is a mortgage in form,) the encumbrance is lost, because the owner will not register it. In the latter, (that is, when upon its face the deed is absolute,) because by his folly he cannot register it." And the Court then added, that a case was brought within the Act by the reservation of any thing to the former owner, which, *if inserted in a deed*, would give him a valuable interest in the property—whether that interest was legal or equitable. It is very plain, that it must in reason be so. There are two kinds of fraud practised by means of these incumbrances. One is, where the former owner remains in possession, using and enjoying the estate after he has conveyed it as a security to another, and thereby gains a false credit. Then the law requires that the conveyance should speak the truth in itself, as to its nature, and also that it should be registered, in order that the world may see for what the encumbrance

is created. Another is, where the possession passes to the incumbrancer, but still leaving an interest in the former owner. Then, also, the law requires that the conveyance should speak the truth, and be registered for the purposes of publicity, in order that the creditors of the former owner may not be baffled by his apparent departing with the property, but take their remedies, legal or equitable, directly against the debtor's remaining interest, whatever it may be. For that reason, in *Halcombe* v. *Ray*, 1 Ired. 340, it was held, that an absolute deed, intended at the time as a mortgage, was void under the Act of 1820 and 1829; because, if they were not thus held, it would make those acts a dead letter, as parties would have nothing more to do, but leave out the condition or proviso for redemption, and the whole policy of the Legislature would fall to the ground. The language of the case is, "If the deed had truly expressed the contract of the parties, the mortgagor's creditors would have a plain *legal* remedy under the Act of 1812, against his equity of redemption in land, and *in equity* against that in chattels; and the Legislature, by the Acts under consideration, intended to provide for those creditors such means of knowledge as would enable them to avail themselves promptly and cheaply of *those remedies*. Our duty is, to receive and administer the statutes in a sense which will secure to the creditor the whole benefit intended for him; and we are obliged to hold the deed void, because, if allowed to stand, the creditor would be in the same condition as if such laws (the registry acts) had never passed." It is thus seen, that this Court thought the meaning of the Act was not to be found out by tying our attention down to the words "deeds of trust or mortgages"; but that those words were used as examples or instances of incumbrances, and that the true sense of the Act extends to every transaction that was intended between the parties to be an encumbrance. That is declared, in so many words, in *Newsom* v. *Roles*,

1 Ired. 179. The Court say "the case of *Gregory* v. *Perkins* has in view those conveyances, which, *whatever be their form*, are intended by the parties as *securities*; upon which, if the instrument had set forth the true and whole agreement, the property, in the view of the Court of Equity, is deemed to be in the apparent vendor, though liable, as a security, for a sum of money due to the apparent vendee." In other words, that case treats of transactions "that appear to the world to be sales, but are, as between the parties, secretly mortgages, *or in the nature of mortgages*." All these positions were laid down as the opinions of the Court, and not of the single Judge who spoke for the Court; and I believe they were fully entertained by all the members of the Court, at the time. To show how completely the doctrine was settled in my own mind, as the doctrine of the Court, I will take the liberty of referring to what I said of it in *Womble* v. *Battle*, 3 Ired. Eq. 196, in using it in illustration of the positions I there took. It was, "that, as the object of the Acts of 1820 and 1829 is to suppress fraud by compelling persons to register incumbrances, the necessary construction of them is, that *every incumbrance*, not in writing, and so not capable of registration, *is within the mischief of the Act*, and made void by it." I am aware that these registry acts have not been favorites of my brother DANIEL, because they treat acts and avoid them as fraudulent, when there may not be an actual or intended fraud; and in the case of *Womble* v. *Battle*, he refused to allow any weight to the argument drawn from them against the vendor's, or other secret, equitable liens. But the act of 1829 is not directed against frauds actually perpetrated, as the *St.* 13 *Eliz.* is, but regards acts which tend to fraud. As it says, it really means "to *prevent fraud* in deeds of trust and mortgages," by making them void in the same manner as they would be by the statute of 1715, if they were actually fraudulent. That policy of the law a Judge ought to further and not defeat by any

opposite motion of his own. For my own part, however, I deem it a most wise policy to cause incumbrances to be published. And in the case last mentioned, Judge NASH seems to have the same views of it. He says, "there can be no doubt of the policy of the Legislature in the enactment of this statute, of 1829. It was to put an end to the *many frauds* which *might* be practiced on creditors and purchasers by secret deeds of trust and mortgages, by furnishing a convenient and sure mode, in which might be discovered *all incumbrances* under which an individual held his property." Now, I would ask, is not a pledge of a negro an incumbrance? If not a mortgage, is it not a security for debt, and at all events, a security *in the nature of a mortgage?* Is it not, then, within the mischief of the act, and therefore to be remedied by so construing the act, as to prevent its being evaded by means of the use of a pledge in the place of a mortgage, as contra-distinguished from it by an actual conveyance of the chattels —I think the cases I have cited, if they are to be allowed any authority as adjudications of this Court, decisively answer those questions; and that they are as much forbid a resort to pledges to escape the necessity of giving notice of them by registration, as they do a resort for that purpose to conveyances absolute upon their face. Neither is 'a mortgage," in terms not appearing upon its face to be so. But the same reason, which induced the Legislature to forbid the taking of absolute deeds, when a security in nature of a mortgage is intended, likewise forbids the taking "a pledge" instead of a mortgage, if by taking the pledge, the transaction is to be by a parol or unregistered agreement so as to be kept secret. I cannot but express exceeding regret at the thought, that those cases should be over-ruled, both because it tends to subvert all certainty in the law, and also to obstruct a most wise policy of the Legislature. Independent, however, of the authority of those cases and the reasoning on which, as declared in them, the resolutions were adopted, they are

fully sustained by adjudications upon other statutes, in their nature remedial, or for the suppression of fraud. Take for example what Lord COKE says in *Irvin's case*, 3 Rep. 82. that, if, contrary to *St.* 27 *Eliz.* avoiding, as to purchasers, a previous conveyance with a power in the grantor to revoke it, a man make a deed and reserve to himself a power to revoke it *with the assent of another*, it is within the statute, "for otherwise the good provision of the act by a small addition—an evil invention—would be defeated." So, it is a rule of law, that an appointment is not a conveyance, and the estate of the appointee takes effect, as if it had been created in the instrument, which created the power. Yet Lord HARDWICKE, notwithstanding the verbal criticism, held that the execution of a power *is a conveyance* within the meaning of the *St.* 13 *Eliz.* c. 5, in favor of creditors, although the act uses the terms, "feoffment, gift, grant, alienation, bargain, and conveyance," ousting "appointment," or any word equivalent to it in its restricted sense of being the execution of a power. *Marlborough* v. *Godolphin*, 2 Ves. 60. The case of *Scrafton* v. *Quincy*, 2 Ves. 413. is still more appropriate, because it was a decision upon a registry act. A deed of appointment was made for land lying in a Register County, in pursuance of a power created in a deed not registered, and the appointee was postponed to a mortgage, subsequently made but registered first. It was contended the Act did not apply, because those deeds did not convey land, but only created a power to appoint, and the appointment. But what said the Chancellor? "Consider the intent and meaning of the act. The case is clearly within the mischief. It is said this deed is not to be considered as a separate conveyance, but only the execution of a power. If that construction was to prevail, there would be an end of the registry and of the act of parliament, for by these means secret deeds" (not conveying the land, but creating and executing powers over it,) "might be set up to defeat him who had regis-

tered. Bring a conveyance actually affecting the land, though in virtue of a preceding power in another deed, *this is, within the intent of the statute and common understanding, such an incumbrance* as ought to be registered." One would think that those cases and observations were sufficient to prove the proper construction of our statute, and that a pledge of specific chattels is within the provisions, just as much as a mortgage proper. But I will add some others, that I may omit nothing that may serve to elucidate the point, and give full efficiency to this valuable statute, if executed in the spirit in which it was passed. In *Saunders* v. *Ferrell*, 1 Ired. 97, there was an ante-nuptial marriage contract, and the husband fraudulently reduced it to writing, so as to omit a material provision in favor of the wife; but after the marriage, a settlement was executed according to the original and true agreement. Yet the Court held, that evidence of the contract, as far as it differed from the written agreement, could not be received in support of the settlement, notwithstanding the fraud on the wife, because it was in parol; for it was deemed "a self-evident proposition, that those agreements must be in writing, as in that form alone do they admit of registration"—which ceremony the law requires, as respects marriage contracts. It might have been said, then, that the Legislature knew that people sometimes made verbal marriage contracts, and therefore, that in requiring marriage contracts to be registered, written ones alone were meant. But the answer was, that secret incumbrances, in the form of marriage contracts, were the evils in view, and in order to prevent them the law required the registration of all marriage contracts, and, in so doing, required them by implication to be in writing, and made them void if they were not. The same reason applies here. Again: in *Thorpe* v. *Ricks*, 1 Dev. and Bat. Eq. 613, a man contracted for the purchase of land, and, in order to pay for it, borrowed the money, and secured it by having the

land conveyed by his vendor to the lender of the money, taking from the latter a written acknowledgment, that the land was but a security. The Act of 1812 enacts that "the equity of redemption in lands pledged or mortgaged," shall be liable to execution; and it was contended, that the purchaser's interest was not subject to execution, because there was no "mortgage," and of course he had no "equity of redemption," as the deed was not a formal mortgage, with an express provision for defeazance. But notwithstanding the policy of selling such interests under execution, instead of a decree of a Court of Equity, did not accord with our views, (as it never did, I believe, with those of any lawyer who gave the subject even a little thought,) the Court held, that we were bound to advance the policy approved by the Legislature, and therefore, that an equity of redemption, raised by construction of the Court of Equity, was subject to execution, as well as those expressly made so by the terms of a mortgage. This was so held, because "it is obvious," said Judge GASTON, "that the great purpose of the enactment was to furnish an easy and expeditious remedy to creditors, against debtors who held *redeemable interests, actually of value;* and it is equally obvious, that if we adopt the narrow construction contended for, every debtor, by a slight change of *form*, may secure to himself such valuable interests, and place them beyond the operation of the statute. Therefore, we feel bound to hold, that whatever a Court of Equity holds to be an equity of redemption in land is, by force of the express legislation, liable to sale under execution." It was also held, in *Harrison* v. *Battle*, 1 Dev. Eq. 537, that when one makes a deed of land, in trust to sell to pay debts, the resulting trust, though it cannot be sold, as a trust, under the first section of the Act of 1812, may be sold as an equity of redemption, within the second section. Why? there is no "mortgage"; and that is the stronger because the Act in two sections distinguishes between "trusts"

and "equities of redemption." But the trusts there spoken of are of a different kind from that resulting to a debtor, on his conveyance upon a trust for payment of debts, and therefore the differences between those trusts and equities of redemption did not forbid the bringing of other trusts within the second section of the Act, that were within the reason of it. Therefore, Judge HENDERSON said, "we cannot distinguish his, the debtor's, right to have the lands again after the payment of the debt, for which it stood *as a security*, from an equity of redemption. It has all the essentials of that right, although it wants some of the formal parts. Its exemption from sale under a *fieri facias* is equally an evil, with the exemption of equities of redemption. The mischief is precisely the same, and we therefore think it within the spirit of the section of the Act." This doctrine came under review in *Pool* v. *Glover*, 2 Ired. 129, and the Court admitted that there were forcible objections to selling resulting trusts, under legal executions, but said "that cannot justify the Court in striving against the policy of the Legislature, by putting such construction on the statute, as will virtually repeal it, by enabling persons to evade it by the simplest contrivance. The question is, what is a mortgage, and what an equity of redemption *within the sense of the Act?* Is a deed of trust of that character? Not a reason can be given against selling such a resulting trust, which would not equally condemn the sale of a proper equity of redemption—one arising on "a mortgage" in the most appropriate sense of that term. When, therefore, such sale (of a resulting trust) is argued against, the fault is found with the policy of the act, and not with its construction. The construction is unavoidable. The purpose of the act is to aid creditors by a sale of a valuable interest of the debtor under execution. It is remedial and to be construed so as to suppress the previous mischief and advance the remedy. Therefore, the Court could not allow the execution to be baulked by the libe-

ral impediment, that the debtor had not "an equity of redemption," because he had not conveyed his land to his creditor, with a power to redeem it, but had conveyed it to a third person, with power to call for a reconveyance, upon payment of the same debt before a sale. Such an interpretation would be paltering with the sense of the Legislature. In substance, the debtor has the same interest in both cases; and therefore it must be liable in both instances alike." So it seems to me here, that a debtor who gives a mortgage on his slave or horse, and he who pledges them, has *in substance* the same interest in value and reality, though not in form. In each case he is the owner of the property; in the one case, he is so at law: in the other, indeed, he is not at law, but he is in equity; and that, for the very reason that equity has respect to the substance without regard to the form: And in each case the property is liable, as a security, to pay a debt to another person. Is not this, then, precisely the case, in which the Legislature intended, that an encumbrance, *in whatever form*, as was said in *Newsom* v. *Roles*, should be put into writing and registered, in order that the debtor should not, on the one hand, have a false credit, nor, on the other, have an interest of value concealed from his creditors? What matters it to the creditors of the owner of the property; or how can it affect the policy which called forth these statutes, that, as between the parties themselves, there may be some slight difference between mortgages and pledges, in respect of the remedies on them? It is of no consequence whatever. In either case the creditors can have their remedy against the property, either as the legal or equitable property of the mortgagor or pawner for their satisfaction, if they can ascertain his interest; and therefore, the Courts ought so to construe the act, as to afford the creditor all the light as to the debtor's interest which he would get under the act, if the debtor had given the security in one of those usual forms, which are mentioned

in the act, namely a deed of trust or mortgage. Is it possible, that all the anxious legislation "to prevent frauds" by incumbrances, is to be rendered nugatory "by a slight change of *form*," as was mentioned by Judge GASTON in *Thorpe* v. *Ricks*, by calling the incumbrance *a pledge* instead of a mortgage? If that be so, who does not see, that debtors will seldom convey chattels by way of open and formal mortgage, hereafter, but will proceed by verbal pledge; especially in those hardest and most oppressive cases, in which the money is advanced upon an agreement for usurious interest. It is to be feared that it would let in a flood of fraud. It seems to me, therefore, that, if this were a pledge of a specific chattel, it would be void under the act of 1829, as being clearly within the mischief; and that this is the plain result of the numerous cases on the act, besides those upon other acts of the like kind. This brings me next to state more particularly the reasons, why the present case is not within the act—as I think it is not, either in respect of the words of the act, or the mischief. In the first place, the subjects of the conveyances mentioned in the act, are "estates" real or personal, which term in itself denotes something corporeal. But the act is yet more precise upon this point, when it comes to designate the place for the registration of the deed of trust or mortgage, by saying that it shall be in the County where "the land lieth," or, in case of chattels, the County where "the said chattels are situate." It is evident, therefore, that the Legislature contemplates a mortgage of chattels as well as of land. Incumbrances upon such property are usually called, and "in common understanding" are mortgages or deeds of trust. But we do not call an assignment of a bond or a transfer of stock, or a power to transfer, as securities for debt, nor usually consider them to be, mortgages or deeds of trust. But I own these reasons would not satisfy my mind, if they stood alone. For, if the bond or the stock, if unencumbered, or if the debtor's interest in it, sub-

ject to the incumbrance, could be rendered liable to the satisfaction of a judgment, either upon execution, or by decree of the Court of Equity, I should deem the case within the reason of the act, and therefore subject to its operation. But debts, stock and *choses* in action generally, are not applicable to the owner's debts in either of the ways I have mentioned, nor in any way during the life of the owner, except by his own transfer of them, or a legal assignment of them in the cases of bankruptcy or insolvency. They are not goods or chattels, and as such subject to a *fieri or levari facias*; and there is no instance, that I am aware of, except one, in England, in which the Court of Equity has laid hold of them for the satisfaction of judgments—for they are not equitable property, but are legal rights. In the administration of a dead man's estate, the Court of Equity controls interests of this kind, as part of the fund which the executor is accountable for as trustee; and when the law undertakes to discharge a debtor from his debts, by taking his property for the benefit of his creditors, it provides for an assignment of these as of other interests. Being in their nature legal rights, equity leaves it to the law to dispose of them; and no method has as yet been provided for that purpose, but that of taking execution against the body, and thereby inducing the owner to pass them by his contract in satisfaction of the particular debt, or to surrender them as a bankrupt or insolvent for the benfit of all his creditors. The Court of Equity deems that an adequate remedy, and therefore sees no necessity for coming in aid of the law. The exception to which I allude, is that established in *Edgell and Hayward* v. *Davie*, 3 Atk. 352; and that proceeds upon the very special ground, that the person of the debtor, who had been discharged under the insolvent debtor's act, was protected against a *ca. sa.* by the act of parliament, which, at the same time, made his future effects liable for the debt. Even that case has been questioned by

very high authority—that of the Court of Exchequer, in *Otley* v. *Lines*, 7 Price 274. Though questioned, it was not over-ruled, and it seems to me to be good law; and this Court acted on it in *Brown* v. *Long*, 2 Dev. and Bat. Eq. 138; because, in those cases, the law intended the debtor's effects to be answerable for the debt, and there was *no possible remedy* at law, as the body was protected, and the only property he had was not tangible. That view is entitled to the more respect, because it is taken by Lord REDESDALE, who states that as a proper case for the Court of Chancery to exercise its extraordinary jurisdiction of enforcing a judgment against the debtor's legal effects, *Mit. Plead.* 115. Except that case of "very particular circumstances," as Chief Baron RICHARDS called it, I have met with no other in England, in which the creditor succeeded in getting the Court of Chancery to interpose. In *Dundas* v. *Dutens*, 1 Ves. Jr. 196, Lord THURLOW asked if there was any case, where a man having stock in his own name, had been sued for the purpose of having it applied to satisfy creditors? He said, "those things, such as stock, debts, &c. being choses in action, are not liable. They could not be taken on a *levari facias*. It is quite new to me, that this Court can touch it. I have not heard of such a thing." Lord ELDON, in *Nantes* v. *Corrock*, 9 Ves. 189, held, that equity could not attach stock or *choses in* action, on which there was no lien for the payment of debts. And in *Rider* v. *Kidder*, 10 Ves. 360, he repeated, that "it is clear, stock cannot be attached in the life of the party." He added, "such was the language of Lord THURLOW in *Dundas* v. *Dutens*, and also in the case of Sir Alexander Leith, when a bill was filed, to try whether this Court would give execution in aid of the infirmities of the law, and it was held, there was no jurisdiction." In the case of *Caillaud* v. *Estvick*, 2 Anstr. 381, upon *Dundas* v. *Dutens*, 1 Ves. Jr. 196, being referred to, Chief Baron MACDONALD said, that he remembered applying on behalf of the Crown, to

have the assistance of equity in aid of an extent, to get at stock in the funds, and it was rejected. Finally, the case of *Otley* v. *Lines*, already mentioned, occurred in 1819, and was decided on demurrer, and seems to have settled it to be the law of England, that debts or any *choses* in action cannot be applied by the Court of Equity to the payment of debts. In some of the States of this Country, I am aware that it has been provided by statutes, and in others judicially decided, that they may. But there has been no decision to that effect in our Courts, nor interposition as yet, of the Legislature; and I cannot make the precedent.

Being brought to this conclusion, it follows, that, if there had been here the most formal assignment of the stock executed and registered, it would have availed the creditor nothing. Consequently he could suffer no prejudice by the omission to make or register such an instrument; and the case is not within the acts requiring registry of incumbrances, as the means of preventing fraud. It has also material weight with me, that the Banks in this State and almost in all others, have been in the habit of taking pledges of their own and other stocks, as securities for loans, and they have never thought of registering them—at least not in this State. And we know that our Banks have been generally under the management of able lawyers and other active and thorough men of business.

On taking assignments of bonds and other negotiable instruments, as securities, I believe too the universal course has been to take them by indorsement and delivery of the instrument, and not by deed of trust or other instrument to be registered. When debts due on accounts, or other choses not assignable at law, are taken as securities, deeds are taken generally it is true; but that would be the case, as evidence of the assignments and the usual mode of making them before the registry act. I believe that, when taken, they are commonly registered: for they

generally include other things, as land or specific chattels, which render it necessary; and if they did not, they would probably be registered from habit. But the universal course with respect to negotiable securities, is to transfer them to the creditor or one for him, by endorsement, which is never registered; and that shews the sense in which the Act has been received by the profession and the people generally, from the time of its passage. Upon this ground, therefore, that this is not merely a pledge, but that it is a pledge of stock, I think the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

JOHN JONES TO THE USE OF G. W. BROWN vs. PENIL GILREATH & AL.

Courts of Law in this State only recognize the *legal* claimant in a suit, and will not permit a set-off to be introduced against one, who is alleged to have an equitable assignment of the claim.

Where a suit is brought by A. against B. and C., a claim by B. alone against A. will not be allowed to be set-off.

Appeal from the Superior Court of Law of Henderson County, at the Fall Term, 1846, his Honor Judge BAILEY presiding.

This was an action of debt on a bond for $239, given by the defendant to the plaintiff. Pleas: Payment and set-off. On the trial, the defendants proved that the defendant Justice executed the bond as surety for the other defendant. And they offered to prove further, that the plaintiff had assigned the bond, without endorsement, to one Brown, and that this suit was brought for Brown's benefit: and that Brown was indebted to Gilreath, the principal debtor in this action, by promissory note made by Brown to Gilreath. But the Court excluded the evi-

dence thus offered, and there were a verdict and judgment for the plaintiff; and the defendant appealed.

Avery, for the plaintiff.

No counsel for the defendants.

RUFFIN, C. J. It was proper enough to receive the evidence that Justice was the surety of Gilreath, so as to give the surety the benefit of the Act of 1826, by having the property of the principal seized and sold before that of the surety. But the evidence was competent to no other purpose; and all the other evidence was properly rejected. The Courts of this State have steadfastly refused, for a great many years back, to look, upon any equitable principles, to the interests, rights, or duties, of any persons but the parties of record. If the rights of one of the parties, or against one of them, depend on equities, it has been thought safest and most legal to leave those persons to their redress in the Court of Equity; in which the redress will be duly and by a regular proceeding administered. *Jones* v. *Blackledge*, 2 No. Car. Law Rep. 457. For that reason, Brown's note was not a set-off in this action.

But, if Brown had been the endorsee of this bond, and as such the plaintiff in this action, his promissary note to Gilreath, one of the defendants, would not be a set off. *State Bank* v. *Armstrong*, 4 Dev. 519. How can it be told, that Brown has not a separate demand against Gilreath, which he has held up to counterbalance his own note to him; and which, possibly, he might lose if Gilreath, instead of settling those separate debts against each other, were at liberty to use the notes to himself in bar of this joint action against him and Justice. The case does not come within the description of the statute, namely, where there are mutual debts subsisting between the parties of the action.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JOHN MAINOR AND LILLY WILKES.

Where, upon a trial for fornication or adultery, one party is found guilty and the other not guilty, no judgment can be rendered against the former. The case of *The State* v. *Tom*, 2 Dev. 569, cited and approved.

Appeal from the Superior Court of Law of Robeson County, at the Spring Term, 1846, his Honor Judge Dick presiding.

The two defendants, a man and woman, were indicted for committing the crime of fornication, by bedding and co-habiting together, without being married. They pleaded not guilty, and were put on their trial together, and the jury found Mainor guilty and Wilkes not guilty. Upon the motion of the defendant, Mainor, the judgment was arrested; and the Solicitor appealed.

Attorney General, for the State.

No counsel in this Court for the defendants.

Ruffin, C. J. The Court holds, that after the acquittal of one of the defendants, there could be no judgment against the other. The crime charged on those persons could not be committed, but by both of them; and upon a verdict, that one of them was not guilty, it appears conclusively that the other could not be. It is exactly like the cases of riots, conspiracies, and principal and accessary, which we find in the books. *Rex* v. *Sudburg and Heafs*, Ld. Ray. 484, Salk. 493. *State* v. *Tom*, 2 Dev. 569. The farthest the Courts have gone is to allow one of the parties to be tried by himself and convicted, and then judgment is given against that party, because, as to him, the guilt of the other party is found as well as his own. But when the one has been previously tried or acquitted, or when both are tried together and the verdict is for one, the other cannot be found guilty—for he cannot be guilty, since a joint act is indispensable to the crime in either, and the record affirms that there was no such joint act.

Let it be certified to the Superior Court, that there was no error in arresting the judgment.

PER CURIAM. Ordered to be certified accordingly.

SARAH GRANT, ADM'X. &c. *vs.* JAMES WILLIAMS.

Where a person had agreed to purchase a horse, which was delivered to him and was to be his when he paid the full price, and he died before he completed the payment, this was a bailment coupled with an interest, which, on his death, vested in his personal representative.

Goods of a deceased person, in the hands of an executor *de son tort*, cannot be taken in execution for the personal debts of such executor, no more than in the case of a rightful executor or administrator.

Appeal from the Superior Court of Law of Duplin County, at the Spring Term, 1846, his Honor Judge MANLY presiding.

This was an action of trover for a horse, in which the following facts appeared:

John Farrier had been the owner of the horse in question, and sold him to Hezekiah Grant, the plaintiff's intestate, upon an agreement that he should be the property of Grant upon the full payment of the purchase money. At the time of Grant's death, $250 of the agreed price was still unpaid, but Farrier, who was a witness in the case, stated that he considered the horse as Grant's property at the time of his death. The widow, the present plaintiff, after the death of her husband, continued, or took into her possession, the horse, and kept him for twelve months. During this time, an execution against her for her own debt was levied upon the horse, and, at the sale, the defendant became the purchaser. The plaintiff, who was present, forbade the sale, and explained to the company, that the horse belonged not to her,

but to the estate of her husband. She subsequently was duly appointed administratrix on the estate of Hezekiah Grant, and brought this action.

Under the charge of the presiding Judge, the jury rendered a verdict for the plaintiff. A new trial was asked for upon three grounds: 1st, that Hezekiah Grant was a mere bailee of the horse, and no right of property vested in his representative. 2d, that at the time of the conversion, the plaintiff was an executrix in her own wrong of her husband, and the property in her hands was liable to the payment of her debts. And 3d, the plaintiff, by her acts and claim in respect to this property, is estopped from claiming in any other right.

The presiding Judge decided all these points against the defendant, discharged the rule for a new trial, and gave judgment for the plaintiff, from which judgment the defendant appealed.

D. Reid, for the plaintiff.
Warren Winslow, for the defendant.

Nash, J. We concur with his Honor in his opinion upon each of those points. From the evidence in the case, the horse was not bailed to Grant, the right of property was in him by virtue of the contract. Although at the time of his death, the whole of the purchase money was not paid, yet from the declarations of Farrier, it is evident he had abandoned and given up any lien which he might have had on the horse, and that it belonged to Grant. If, however, Grant was but a bailee, it was a bailment coupled with an interest, which passed, upon his death, to his personal representatives. It cannot be necessary to cite authorities to prove that the goods of a deceased person cannot be taken in execution, to satisfy the debts of his representative, while in his hands as such representative. If it were, the case of *McLeod* and *Drummond*, in 17th Ves. &c., and of *Satterwhite* and *Car-*

son, 3 Ired. 549, would be sufficient. In the latter. the Court do not so much decide the question, as recognize it as established law. And indeed it has not been, in the argument here, denied; but, while it is admitted, it is said that the principle is true only as respects rightful executors, and does not extend to executors in their own wrong. In other words, the shield which the law throws around the property of the deceased, while in the hands of him who has taken it into possession, by permission of the law and under its sanction, is withdrawn when in the hands of a freebooter who has taken them, not only without the sanction of the law, but in defiance of its authority. The cases to which our attention has been drawn upon this point, do not sustain the argument. With one exception, they are all cases of rightful administrations. The one in 1 Sal. 295, *Whitehall* v. *Squires*, as reported by him, is in point. The deceased had put a horse into the possession of the defendant to agist, and, after his death, the plaintiff had promised the defendant to bury him, and in part payment of his bill, agreed he should keep the horse. Subsequently, he took out letters of administration upon the estate of the deceased, and brought the action in trover to recover the value of the horse. The majority of the Court decided the plaintiff could not recover, but Lord HOLT differed with them. No reason is given in *Salkeld* for the judgment of the majority, but in *Carthew* 108, it was held, that the defendant was guilty of a wrongful act in keeping possession of the horse, and had thereby made himself Executor in his own wrong, and that the plaintiff, by assenting to his so doing, was a *particeps criminis*, and was not at liberty, to take the property from him. The opinion of Lord HOLT is sustained by the whole Court, in the case of *Mountford againt Gibson*, 4 East. 441. But the case before us is essentially different. Here the plaintiff never did assent to the sale or agree the defendant should take possession of the horse. On the contrary, she forbid the sale. She was in no wrong

in that particular. And it is further to be remarked, that the claim of the defendant was for a debt, which the plaintiff, as the rightful administrator, would have been compelled to pay—being for the burial of the intestate. It was said by Lord ELLENBOROUGH, in the case of *Mountford* v. *Gibson*, that Lord HOLT's opinion was founded upon the fact that the plaintiff had been guilty of but a single act, not done in the character of an Executor; and therefore he was not an Executor in his own wrong. The defendant's counsel urges, that the long continued possession and use of the horse by the plaintiff in this case, constituted her an Executrix in her own wrong, and thereby subjected the property to her debts. Here too the cases referred to are those of rightful executors or rightful administrators. In that of *Quick and wife* against *Staines*, 1 Bos. and Pul. 293; the wife of the plaintiff had been the widow of McPherson and his Executrix. She took possession of the goods in question and used them as her own for three months; she then married Quick and delivered over the goods to him: they were executed and sold for his debt, and the action was brought to recover them back. The Court decided the action could not be sustained, because the plaintiff, Mrs. Quick had committed a clear *devastavit* in *delivering* the goods to her second husband, after using them herself three months as her own. In remarking on this case, our object is to show, it does not apply to the one we are considering, but not for the purpose of sanctioning the doctrine it contains. In the case of *Gaskill* v. *Marshall*, 1 Mo. and Rob. 132—and also reported in the 5th vol. C. and R. 31, 24th vol. C. L. Rep. Lord TENTERDEN ruled, that an administrator, who had taken possession of goods of the intestate and used them in the house of the intestate for three months, might, as administrator, maintain trespass against the Sheriff for seizing, and, after notice, selling them under an execution for the administrator's own debt. This case is cited and approved by Lord DENMAN in delivering the

opinion of the Court in the case of *Fenwick* v. *Laywick*, 2 Adol. and Ellis, 42 vol. E. C. L. R. 590. His Lordship observes, "In that case, it is true, he (Lord TENTERDEN) is *reported* to have said, if the plaintiff had been in possession of the goods a *very long* time, it might have been otherwise;" what length of time will suffice to have that effect is not stated. And it may safely be laid down, that no length of possession and use of the property of a deceased person by his personal representative, and which is not inconsistent with the trust by which he holds it, will subject the property to be sold under execution for the debts of the executor. In the case of *Fenwick* and *Laywick*, just referred to, Lord DENMAN, in remarking upon the length of time the goods had been in possession of the defendant, says, "here the possession has been long, but then it is a possession consistent with the will and necessary to the execution of the trusts reposed." That, it is true, was not the case of the sale of an intestate's or testator's property to pay the debt of his reprentatives; but he considers the principles as the same. If such be the law as regards a rightful executor or administrator, upon what sound principle can it be said that it is different with an officious and tortious intermeddler? A rightful executor may sell the personal property of his testator; the legal title is in him, and the *bona fide* purchaser will acquire a good title. And this, notwithstanding a misapplication of the purchase money by the executor in the payment of his own debt. Not so with an executor in his own wrong; he cannot, as against the rightful executor, pass a good title by sale, except in making such payment as a rightful executor might be compelled to make. And yet, it is contended, the same property may be taken by execution to satisfy his individual debts. This cannot be so—it is directly in the teeth of the cases of *Satterwhite* and *Carson*, 3 Ired. 549, and *Whit* and *Ray*, 4 Ired. 14. In the former, it was decided that whatever doubts might have rested on the question, as it res-

pected a full executorship, it could never have been supposed that the testator's goods could be taken for the debt of an administrator *pendente lite;* and this because such an administrator has the right only to take care of the goods. But the *law* gives to the executor *de son tort* no such *right.* Is it possible a principle can be sanctioned, whereby the estate of a deceased person is rendered less secure in the hands of an intruder, than in those of him who is in the rightful possession of it? It cannot be. It would be offering a premium to fraud and violence, inconsistent with the good order and justice of the country. But the case of *Whit* and *Ray* fully answers the question. In substance, it is the same with the one we are now considering. Upon the death of Pierce Roberts, his wife and children took possession of his personal property. The widow married Oliver, who lived with them and used the property for ten or twelve years as his own. The defendant, a Constable, levied an execution, which he held against Oliver for his individual debt, upon the horse sued for. Administration was then granted to the plaintiff, who brought the action in trover for the conversion. The Court decided, that the possession of the next of kin, though for such a length of time, where there was no personal representative of the deceased, gave them no legal title; and they acquired no such interest in the horse as was liable to execution for their debts, and that an administration, granted after that lapse of time from the death of the intestate, vested in the administrator the legal title and he could recover. In that case, as in this, the long continued possession of Oliver and his use of the property were urged as a fraud upon his creditors; but it was held, *that* did not divest the administrator of his legal title or prevent him from recovering. The only difference between that case and the present is, that, in the one we are now considering, the plaintiff is the individual, who was in possession of the horse and for whose

debt it was sold—in the former, the administration had been granted to a third person. That surely can make no difference; it is the right, which appertains to the office of representative of the person who fills it, that supports the action. And this is an answer to the last objection of the defendant. The doctrine of estoppel does not arise in the case—the plaintiff does not sue in her own right—but in *auter droit*. The case of *Fox* and *Fisher*, 3 Barn and Ald. 243, has no application to the present. That arose under the bankrupt act of 21*st James the* 1*st*, whereby all the property in the possession, order and disposition of the bankrupt, pass into the hands of his assignee. The bankrupt was in the possession of the goods of the deceased at the time of her bankruptcy, and a creditor of the deceased was appointed administrator, and brought the action against the assignee, and judgment was given for the defendant upon the wording of the statute. But for the statute the defendant would have been entitled to recover.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF ROBESON COUNTY vs. NEIL McALPIN & AL.

Under our statutes, a second action may be brought on a Sheriff's bond, for money, which he holds as County Trustee, by any person who is injured thereby—*toties quoties*—until the penalty is exhausted.

But the party injured may, if he prefers it, recover what is due to him by a *scire facias* on the first judgment, setting forth other breaches.

Appeal from the Superior Court of Law of Robeson County, at the Spring Term, 1846, his Honor Judge PEARSON presiding.

The case is stated in the opinion delivered in this Court.

Strange, for the plaintiff.

John Winslow, *Warren Winslow*, and *D. Reid*, for the defendant.

NASH, J. This was an action of debt, upon a Sheriff's bond. On the trial below, several objections were raised to the plaintiff's recovery. But a single one has been sent to us; and so much of the case agreed will be stated, as is necessary to present it. In the year 1831, the Legislature, by a private act, authorized the County Court of Robeson, with others, to abolish the office of County Trustee, and, in such case, devolving upon the Sheriff of such County all the duties of such office. Under this act, the bond was given on which this action is brought. After the institution of this suit, an action was brought on the same bond, at the relation of one Davies, who was Chairman of the Board of Commissioners for Common Schools in the County of Robeson, against the present defendants, and a recovery made to the amount of the money in the hands of the defendant McAlpin, due to that fund—which did not exhaust the penalty of the bond. The judgment in that case was pleaded by the defendants in this as a plea since the last continuance. The jury found a verdict for the plaintiff, and his Honor being of opinion he could not recover, it was set aside, and a non-suit entered. In this opinion, we do not concur. His Honor decided that the former judgment was a bar, because, taking this to be an official bond, there was no provision by statute applicable to it, authorizing a second suit to be brought. We do not agree with his Honor. We do not consider the judgment recovered by Davies a bar to this action, even if it had been obtained prior to its institution, and duly pleaded. In assigning his reason, his Honor says, "the act in relation to official bonds contains a general provision for the institution of

suits, by the persons injured, in the name of the State, without any assignment thereon. *Rev. Stat. ch.* 81, *sec.* 1. But there is no general provision, authorizing a second action. This provision is made specially in the several acts relating to the bonds of Constables, County Trustees, and the Bonds of Sheriff for execution of process, collection of money, &c.; but the act relating to the bonds of Sheriff for the collection of County taxes, contains no such provision, *ch.* 28, *s.* 3. The private act of '31 contains no such provisions in relation to the new sort of bond therein described to be taken."

We are not certain we entirely understand his Honor. The act of 1777, *Rev. Stat. ch.* 109, *s.* 13, in prescribing the form of the bond to be given by the Sheriff for the faithful discharge of his duties in office, which is the one referred to in the opinion, as given for the execution of process, collection of monies, &c., contains the provision, "that no such bond shall become void upon the first recovery, but may be put in suit and prosecuted from time to time, &c." Now this provision *in hæc verba*, is contained in none of the other acts. But yet they contain words which, in our opinion, are equivalent. Thus, in the act in relation to official bonds. the words are, "any person or persons injured, may institute a suit or *suits*, &c." So that of 1818, *Rev. Stat. ch.* 24, *s.* 7, directing the bonds Constables shall give, authorizes *suits* to be brought and *remedy* to be had, and "under the same rules, regulations and restrictions, as suits may be brought and remedies had, upon the official bonds of Sheriffs, &c." A similar provision is made, as respects the bonds of County Trustees, *Rev. St. c.* 29, *s.* 3. It declares a suit may be brought on said bonds and recoveries had, under precisely the same circumstances as constables' bonds. The language is the same. We hold then, that, under these various acts, a second suit may be brought on the official bonds of these various officers, although the language is not the same as in the bonds of the Sheriff,

for the faithful discharge of his official duties. And this appears to be the opinion of his Honor, who tried the cause. But the opinion proceeds, that there is no such provision in the act, relating to the Sheriff's bond for the collection of the county and poor tax, nor in the private act of 1831, under which the bond now sued for was taken. Upon examination it will be found, that the same principle is held in view by the Legislature, in each of these acts. The 3d sec. of the act of '98, *Rev. St. c.* 28, *s.* 3, to which his Honor refers, contains no such provision. The 23d section, however, authorizes the several County Courts to appoint a Finance Committee for their respective Counties; and the 30th section empowers the committee "to institute *suit* for the recovery of all monies due the county from any person liable to account for them—which said suit or suits shall be brought, &c." It may be said this provision throws no light on the subject, as different persons might be indebted to the county. This is true. Different persons may be so indebted, but the same officer might be indebted to the County for different sums of money, as applicable and appropriated to different funds —as in the case of the County Trustee. The words we think are sufficiently comprehensive to embrace the latter case, as well as the former. The private act is, however, very explicit, and leaves no doubt, we think, on the question. This act authorizes the several County Courts in the State to abolish the offices of County Trustee and Treasurer of public buildings, and in that case devolves upon the Sheriff all their duties and responsibilities, as to the collection of monies and their disbursements. After prescribing the conditions of the bond, so to be given under that act by the Sheriff, it provides in the 3d section, "that where it is found necessary to bring *suits*, in the name of the County Trustee or Treasurer of public buildings, such *suit* or *suits* may be brought, &c." We think this clause sufficiently plain. The Sheriff retains in his hands all the funds, which formerly he was required to

pay over to the County Trustee and he holds them to be disbursed as that officer did. Their funds are raised for separate and distinct purposes, and are in fact the products of different taxes, laid by the County Court, and to be paid out by the Sheriff to different and distinct persons, according to the order of the Court. This the law-makers knew, and have therefor adopted, in the section we are commenting on, a phraseology which recognizes the bringing of more than one action on the bond of different persons, and the existence of such actions at the same time. If, in an action, brought by any one authorized to sue, the penalty of the bond is exhausted—and another action should then be brought upon it, the first judgment might be pleaded in bar, setting forth the facts. If pleaded since the last continuance, it can only act as a bar to the further prosecution of the suit. We think, therefore, his Honor erred in holding that the judgment of Davies was a bar to the plaintiff's action. On the contrary, we are of opinion, that under our statutes a second action, such as this, may be brought on a Sheriff's bond, for money which he holds as County Trustee, by any person who is injured thereby, *toties quoties*, until the penalty is exhausted. But we are also of opinion, that the parties aggrieved may avail themselves of the provisions of the statute of William, and recover what is due them by *sci. fa.* on the first judgment, setting forth other breaches. They have an option which course to pursue.

This is a case agreed, and we should not hesitate under the view we have taken of it, to render judgment for the plaintiff; but this we cannot do, without great injustice to the defendant. According to the record, the jury found a verdict for the plaintiffs. and assess their damages for the breach assigned to $1000. The case then states that the balance due from the defendant McAlpin, in Sept. 1841, as ascertained by a settlement between him and the relators in this action, was $693. It then further shows, that, after allowing the defendants

the amount of the Davies judgment, which he had paid and also other payments, that the balance was $200. We regret the judgment was not so taken as to enable this Court now to act finally in the matter. As it is, the judgment is reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

JOHN McKAY *vs.* BENJAMIN WOODLE.

Where an action is brought for a penalty imposed by a statute, or actions are brought founded on rights created by a statute, and for which there was no action at common law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it.

But this rule does not embrace the case, where a statute is simply remedial, giving an easier or cumulative remedy for a wrong, for which there was a remedy at the common law.

Therefore, in an action for worrying, maiming and killing the hogs of the plaintiff, while trespassing on the inclosed grounds of the defendant, the same not having a sufficient fence, according to the Act of 1831, Rev. St. ch. 48, it was not a sufficient objection to the action, that the declaration did not refer to the statute, for the plaintiff had a remedy at common law.

Although the enclosed land, within the bounds of which this trespass was alleged to be committed, belonged to more than one person, yet the actual perpetrators of the act are, even under our act of Assembly, individually liable.

Appeal from the Superior Court of Law of Cumberland County, at the Spring Term, 1846, His Honor Judge DICK presiding.

The questions presented to this Court are stated in the opinion delivered by the Court.

Strange, for the plaintiff.

D. Reid and *McRae*, for the defendant.

RUFFIN, C. J. This is a proceeding to recover damages for unreasonably worrying, maiming and killing the hogs of the plaintiff, while trespassing on the enclosed ground of the defendant, the same not having a sufficient fence. It was commenced by complaint before a justice of the peace, according to the act of 1831, *Rev. St. c.* 48; and he, together with two freeholders, viewed and examined the fence of the defendant, and adjudged it to be insufficient, and assessed the damages to $20. For that sum, the justice rendered judgment, and the defendant appealed to the County Court, and then to the Superior Court, and to this Court. On the trial, on not guilty pleaded, the defendant gave evidence, that the grounds on which the plaintiff's hogs trespassed and were killed, were owned and cultivated by another person and himself jointly; and insisted, therefore, that this remedy did not lie. The Court, however, instructed the jury, that, notwithstanding that objection, the plaintiff might recover. In that opinion, this Court concurs. The defendant, though not the sole proprietor of the field, was the sole perpetrator of the injury to the plaintiff. But even that is not essential to the plaintiff's remedy; for, if the other tenant had united in the wrong, the defendant would be liable by himself, upon the ground that *tort feasors* are jointly and severally answerable. The defendant objected further, that the plaint was substantially defective, inasmuch as it does expressly refer to the statute, which gives this remedy. It is agreed, that, in actions for penalties imposed by statute, and other actions founded on rights created by statute, and for which, consequently, there was no action at law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it. But we believe the rule extends no farther, and does not embrace the case in which a statute is simply remedial, giving an

easier or cumulative remedy for a wrong, for which there was an action at the common law. It is true, the distinction has not been always observed in practice. But pleaders often introduce unnecessary allegations from abundance of caution; and we do not find the distinction any where judicially denied. Declarations on statutes after alleging the facts which, according to the statutes, give the right to the plaintiff, usually add "by means whereof, and by force of the statute in such case made and provided, the said A. B. became liable to pay it;" or "whereby and by force of the statute, an action hath accrued," &c. But they do not state, that, by force of the statute, an action in particular, as debtor case or the like, or in some particular Court, has accrued to the plaintiff. As far as a statute constitutes an ingredient in the plaintiff's right, it is, upon principle, a necessary part of the declaration; and when the right is thus established, and the proper action is brought for a violation of it, the redress ought to be given by the law, though the act, which gives the particular action, be not specified in the declaration. A familiar example is suggested in the practice here. The jurisdiction of a justice of the peace, out of Court, is created by statute. Yet a warrant never refers to the statute, as giving that remedy, when the demand is one, for which there was an action at common law, as debt, or assumpsit on contract. This distinction mentioned, though not uniformly observed, is an ancient one. Thus Fitz Herbert says, that the form of the writ of waste against tenant in dower and guardian varies from that against other tenants. In the writ against tenant in dower, the plaintiff "doth not rehearse the statute, which gave the writ of waste, nor the writ of waste against the guardian, because they were punishable at the common law, before the statute by prohibition and attachment thereupon, if they did waste." N. B. 125. On that passage, Lord Hale makes several annotations on the pleadings

and process in waste; but he does not question the distinction laid down in the text, nor the reason assigned for it. It appears indeed to have been a usual practice, in actions of debt on bonds to perform covenants, under the *Statute* 8 and 9 *William* 3, *c.* 11, to precede the assignment of a second or subsequent breach with the words, "and for further breach of the said A. B. according to the form of the statute in such case made and provided, says, &c." But it is seen now, that that was *ex abundia cautelæ* and not requisite; for it is held in the modern cases, that breaches are sufficiently assigned, although the declaration may not use the language, "according to the form of the statute." *Hardy* v. *Bem*, stated in *Roles* v. *Roeswell*, 5 T. R. 539. *Tombs* v. *Painter*, 13 East. 1. It was never supposed, that a reference to the statute was necessary, if but a single breach was assigned; and, indeed, when several breaches are assigned, the precedents have no such reference in respect to the first breach, but only to the further breach or breaches. The reason for the difference probably was, that, at common law, the plaintiff was obliged to assign a breach, and could not assign more than one. For a single one forfeited the bond, and adding another made the declaration void for duplicity, 1 *Saund.* 58 *a.* To remove that objection, it seems to have been thought proper to rely expressly on the statute, as the authority for the duplicity. For, at common law, although the plaintiff must assign a breach in order to shew the land to be forfeited, *Hayman* v. *Gerrard*, 1 Saund. 101, yet the jury did not assess the damages therefor, as the measure of the plaintiff's redress, but only a nominal sum for the detention of the debt, and the recovery was of the penalty and the defendant had to seek relief in equity. But there is no doubt, that the statute, which is now held to be compulsory on the plaintiff, applies as well to a case, in which there is but a single breach, as to one in which there are several; for in each case the object is to ascertain the real dama-

ges, whether arising from one or several breches, and, by the payment of those damages, to discharge the debtor's body and estate, without resorting to a Court of Equity. The consequence would be that, in the case of but a single breach—that being within the act—it is as necessary to refer to the statute, as the authority for assessing the true damages therefrom, as it is in respect of a second or other breach. For if the plaintiff must, in every case, proceed under the statute, and, if he be obliged in any case to count on the statute, he must be obliged in every case so to count. So the converse must be true: that, if in one case, he need not count on it, he shall not be obliged in any. And such is the conclusion, adopted in the cases before referred to; and, instead of being a departure from the rule of FITZ HERBERT, or an exception to it, it is a confirmation of that rule.

The present case falls within the rule. This remedy, indeed, is given only against a person, who injures stock in his grounds inclosed with an insufficient fence. But that is a trespass, for which the common law gave an action, as well as for a trespass in any other form: for, although the owner of land might take up or drive away beasts trespassing on his land, yet he could never unreasonably worry, maim or kill them.

For these reasons the Court is of opinion that the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

WARDENS OF HYDE *vs.* JORDAN SILVERTHORN, Ex'r. &c.

An executor *de son tort* cannot be called upon to support a disabled slave of the deceased, under the act of Assembly, (Rev. Stat. ch. 89, sec. 19).

Appeal from the Superior Court of Law of Hyde County, at the Fall Term, 1845, his Honor Judge BATTLE presiding.

The following are the only facts upon which this Court thought it necessary to pronounce the law:

This was an action of assumpsit, brought to recover money paid by the plaintiff to the use of the defendant. The wardens had maintained an aged slave, named Susan, belonging to the estate of Robert Silverthorn, deceased. The defendant pleaded "*Ne unques executor*," and the plaintiff replied, that he was an executor *de son tort*. Under the charge of the Court, the plaintiff had a verdict and judgment; and the defendant appealed.

No counsel for the plaintiffs.

Shaw, for the defendant.

Daniel, J. By law, (*Rev. Stat. ch.* 89, *s.* 19,) the owners of old and disabled slaves shall provide for and maintain them. And if the owner will not, the wardens of the poor of the County are required to maintain them and charge the price to the owner; and may sue him for the same. *Section* 20 declares, that if any owner shall be dead, the executor or administrator shall provide for such old and disabled slaves; and so with respect to the guardians of infant wards. And upon failure so to do, the wardens shall provide for such slaves, and proceed against such executors, administrators and guardians, as the owner. And such executors, administrators and guardians, shall be allowed the expense of making such provision for such slaves in their settlements. *Section* 21 declares, that the wardens of one County may remove such old and disabled slaves to the owner or to the executors and administrators of a deceased owner, residing in another County, or to any guardian of the owner, at the expense of such owners, executors, administrators or guardians. We think that the wardens have no right to charge, for the maintenance of old and disabled slaves, any other person or persons than those

who are the *owners* of such slaves by law. The defendant was not the owner of the slave Susan; he never took her into his possession or set up any claim to her; he, in law, had no right to her; and therefore the law throws no obligation on him to maintain her. The fact that the defendant wrongfully intermeddled with other parts of the personal estate of Robert Silverthorn, did not make him liable under the statute to the wardens, for the maintenance of the slave Susan. The clause respecting executors, we conceive, refers to rightful executors, not only for the reason already given, but also because the disbursements of the executors, for a disabled slave, are to be allowed in their settlements—a provision not properly applicable to an executor *de son tort* who is not called on to make the "settlement" in the provision of the act.

PER CURIAM. New trial awarded.

ENOCH COBB *vs.* GEORGE F. CORNEGAY & AL.

Justices' judgments are not property in the plaintiff, for which an action of trover will lie.

They are not records, but they are judicial determinations and muniments of the rights of both parties.

Appeal from the Superior Court of Law of Duplin County, at the Spring Term, 1846, his Honor Judge SETTLE presiding.

The only material facts in this case are stated in the opinion delivered in this Court.

W. Winslow, for the plaintiff.
D. Reid, for the defendant.

NASH, J. This is an action of Trover, brought to recover the value of a justice's judgment converted by the defendants to their own use. The plaintiff had recovered a judgment before a single magistrate, which he had placed in the hands of Summerlin, the deputy sheriff, and one of the defendants for collection. He transferred it to Taylor, by whom it was collected, and the money divided between all the defendants, by previous agreement. Several points were raised in the argument below. We do not feel called on to give an opinion on but one, and that is the first. The Court instructed the jury, that an action of trover can be maintained for the conversion of a justice's judgment. Believing there is error in this opinion, as it lies at the foundation of the plaintiff's right of action, we have confined our attention to it.

His Honor was well justified in giving the opinion he did, as such had been declared by Judge HALL to be the law in delivering the opinion of the Court in the case, *Hedspeth* against *Wilson*, 2 Dev. R. 372. Upon examination of that case it will be found, that the judgment was for the defendant, and the only point in the case was, whether property, fairly won at gambling, and delivered by the loser to the winner, could, by the former, be recovered back. As the judgment below was in favor of the defendant on that point, and the Supreme Court coincided in its correctness, it was unnecessary to decide the other. And believing it incorrect we feel at liberty to revise it. To support the action of trover, the plaintiff must have in himself, at the time of the conversion, the right of property, either general or special, and also must, in general, have in himself, the exclusive right of possession. *Brown on actions at Law*, 433-'4, 29*th L. Lib.* 309, 310. A Justice's judgment, is neither goods, nor chattels, nor has the plaintiff a property in it—and, if he has, it is not an exclusive property. It is well established that trover will not lie for a record. *Bro. on Ac.* 435, 29*th Law Lib.* 311*t*, 6*h Ba. Ab. Trov. Letter D*, 687, *Hard.* 111, be-

cause it is not private property. So neither is a judgment given by a single magistrate. It is true, it is not a record —but it has one essential quality of a record. It concludes the parties from denying the facts it affirms. These judgments are the judgments of a Court regularly constituted by law, and pointed out by the legislative will, for their government. The acts of a Court, so constituted, cannot be private property. They are muniments, in which both parties to them have an interest—but neither an exclusive one. To the plaintiff, it is the evidence of a legal obligation on the defendant to pay, and to the latter a protection from further liability on the original cause of action. In the case of *Hamilton* against *Wright and Parish*, 4 Hawk. 286, his Honor Judge HALL calls a Justice's judgment "a public writing," and Judge HENDERSON, while he argues to show it is not a record, treats it as an *act of a Court*, having, in common with records, the quality of concluding the parties from denying their affirmation. If then a Justice's judgment is not a record, it is *quasi* one. It is a public writing, which, from its nature, cannot belong to any one as a matter of property —but it belongs to the Justice, who gave it, as a public custodier, to be kept by him until drawn out of his hands by the regular requirements of the law.

Other questions are presented by the record—in some of which we do not concur with the presiding Judge. It would, however, do the plaintiff no good to grant him a new trial, as the judgment must still be against him.

For this reason the judgment is affirmed.

PER CURIAM. Judgment reversed and *venire de novo*.

JOHN HOLDFAST, ON DEMISE OF JOHN A. SHAW & AL. *vs.* WILLIAM B. SHEPARD.

A plaintiff may recover in ejectment upon the demise of only one of several tenants in common, to the extent of his interest; and there may be a general verdict and judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeds at his peril.

Where, in an action of ejectment, the defendant relied upon the Statute of Limitations, and the evidence was, that the defendant and A., under whom he claimed, had had seven years actual possession, except for the space of four or five months, an interval that elapsed between the time when a tenant of A. left the premises, and the time when the defendant entered under his purchase. *Held* by the Court, that the interval between these two occupations was too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by A. or any one under him.

The cases of *Bronson* v. *Paynter*, 4 Dev. and Bat. 393, *Godfrey* v. *Cartwright*, 4 Dev. 487, and *Blair* v. *Miller*, 2 Dev. 407, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

This was an action of Ejectment for a house and lot in the town of Elizabeth City. One John King was seized of the premises in fee, and, on the 4th day of September 1834, they were sold, under a judgment and execution against him, by the sheriff of Pasquotank, and conveyed to John C. Ehringhaus. On the same day, Mr. Ehringhaus conveyed the premises in fee to Jeremiah M. King, in trust for Margaret King, wife of the said John King, to her sole and separate use for life, and not subject to any control of her said husband; and upon a further trust, after her death, for such child or children as she might have by her said husband, and as might be living at her death, if any; and if there should be no such children or child, then in trust for certain other persons. After this conveyance, John King and his family continued to reside on the premises; and other creditors of John King obtained judgments against him and had the same house and lot again sold upon their writs of

fieri facias, and Charles R. Kinney became the purchaser and took a deed from the sheriff. He thereupon brought an ejectment against John King and Jeremiah M. King, and recovered the premises in April 1837. Kinney sued out a writ of possession, but did not have it executed; and a witness for the defendant proved, that in October 1837, he heard Kinney say to John King, (who occupied the house,) "You may stay here till I see you again;" and the said King did remain in the house the residue of that year. Another witness proved, that, in the latter part of 1837, Kinney directed the witness, if he knew of any person who wanted a house, and would make a good tenant, to lease the premises for him to such person. The defendant further proved by one Eslick, that he entered into the premises on the 10th of January 1838, and occupied the house as the tenant of Kinney, until the following June or July, when he left the premises and surrendered them to Kinney. On the 10th of November 1838, the present defendant contracted with Kinney for the purchase of the premises, and shortly thereafter took a conveyance and possession of the same, and has since occupied them to the present time.

In 1841, Jeremiah M. King died, having made a will and thereby devised "all his real and personal estate to his wife Keziah," and made her executrix. He died without issue, but left five or six brothers and sisters, who were his heirs at law. John King also died before the suit was instituted, leaving his wife Margaret surviving. The present action was commenced on the 23d of October, 1845, and the declaration contains three counts; the first on the demise of two of the sisters of Jeremiah M. King; the second on the demise of his widow and devisee, Keziah, and the third on the demise of Margaret, the widow of John King. On the trial it was insisted on the part of the defendant, that the plaintiff was not entitled to a verdict on the first count, because it was on the demise of two only of the sisters of Jeremiah M. King,

whereas it should have been on that of all his heirs at law. But the Court held, that, supposing the legal title to have been in J. M. King, and have descended from him to his heirs, the jury might find for the plaintiff on that count, notwithstanding it was upon the demise of only a part of the heirs at law. It was insisted further, on the part of the defendant, that the evidence established, that he and those under whom he claimed had been in the continued and peaceable adverse possession of the premises, for seven years and more before this suit was commenced; and therefore, that the rights of entry of the plaintiff's lessors were barred, and he moved the Court so to instruct the jury. But the Court refused to do so.

The counsel for the defendant then further moved the Court to instruct the jury, that there was evidence that the said Kinney had not abandoned the premises, but intended to retain and occupy them: which instruction the Court also refused to give.

The counsel for the defendant further requested the Court to instruct the jury, that, if the possession of Kinney during the year 1838 was consistent with the usage of landlords in the same community—renting out the house, when he had an opportunity or had an application for it, and closing it up for short intervals, only because he could not rent it to a suitable tenant, that would be sufficient. But the Court declined also to give that instruction: and instructed the jury, that, in order to bar the plaintiff, it was necessary that the defendant should shew a continued possession in himself and Kinney, under whom he claimed, for seven years at least. The jury found a verdict for the plaintiff, and from the judgment the defendant appealed.

A. Moore, for the plaintiff.
J. H. Bryan, for the defendant.

Ruffin, C. J. On the first question the case of *Bronson* v. *Paynter*, 4 Dev. and Bat. 393, is in point. It was

there determined, that a plaintiff might recover upon the demise of the tenants in common, to the extent of their right, though a third person did not join, and also in that case and in *Godfrey* v. *Cartwright*, 4 Dev. 487, that there might be a general verdict and judgment that the plaintiff recover his term, since under the writ of possession the lessors of the plaintiff proceed at their peril. The defence founded on the statute of limitations, we think, must also fail. The possession began "shortly after" the 10th of November, 1838: so that it wanted a month or thereabout of seven years, when this suit was commenced, which was on the 23d of October, 1845. But the defendant insists that Kinney had been in possession, by his tenants or by himself, from October 1837, or, at all events, from the 1st of January, 1838, which would exceed seven years. Eslick certainly held under Kinney from January to June of that year. But the question remains, whether, after Eslick went away, there was any occupation or possession under Kinney's title, until the defendant entered.

A defence of this nature admits the better right to have been in one or more of the lessors of the plaintiff. The *onus* is on the defendant to shew a possession, adverse to the other claimant, and continued for the full term of seven years; and this ought to be established by evidence, that does not leave the point of his possession doubtful—since the original right ought to prevail, unless the bar plainly appear. Now, for a period of four and a half or five months—from June until, at the earliest, about the middle of November—there was no actual occupation of the premises; and the point is, whether it can be said, that the possession then was legally in Kinney. The general rule is, that where there is no actual possession by some person, it is constructively in the owner. Therefore the possession of Kinney, if existing, must, in order to answer the defendant's purpose, be deemed in a legal sense, the actual possession. And here the remark occurs, that

the whole question turns on the first instruction prayed, and that the two others, as expressed, and as far as they differ from the two first, ought, without doubt, to have been rejected. For an intention to occupy cannot amount to occupation, unless denoted by actual occupation, prior and subsequent, so near together as to shew an uninterrupted exercise of ownership, or continued assertion of right, and liability at all times to the possesory action of the owner. And secondly, as there was no evidence of "the usage of landlords" in the town of Elizabeth in particular, or of Kinney's motives for leasing or selling the premises before November, or of his closing the house for short intervals, the defendant could not demand an opinion of the Court upon the hypothesis of a usage, or that Kinney closed the house, and much less that he did so for want of a suitable tenant. The merits of the controversy then depend on the point first raised; which is, whether the defendant has shown, that, from June until some time in November 1838, the possession is to be taken, in point of law, to have been in Kinney. We cannot undertake to say, what interval between two actual personal occupations, under the same claim of title, will interrupt the possession in a legal sense. A day, or week, or month, or even a longer time between the outgoing of one tenant and the incoming of another, may not of itself, perhaps, make a chasm in the possession; especially, if in the mean while, there be any use of the premises, or liabilities incurred on account of the premises—as by listing by one, as owner or occupant, for taxes, or by putting or leaving property there, though of little value, as in the case given in the books, of beer in the cellar or hay in the stable; or by locking up the house and keeping the key. But there is in this case, nothing of that kind; nothing except that in June a tenant of Kinney left the premises, and four and a half or five months afterwards, the defendant purchased from Kinney and went into possession. It is to be taken, that Eslick leased only for

the time he occupied, since nothing more appears; and therefore, that Kinney might have immediately entered, or leased to another person. Eslick says, indeed, that he surrendered the possession to Kinney, and it is insisted that Kinney is to be deemed thenceforward in possession. But that is not a just inference. It does not follow, because Eslick's lease and possession were determined, that Kinney then took, much less that he continued in possession for the next five months. It is argued, that the case is within the reason of the rule. *Blair* v. *Miller*, 2 Dev. 407, that it is sufficient, if an owner has a field in crop or under fence, as a part of his plantation, according to the general course of agriculture, or has tenants to make a crop on his land every year, though the one does not enter the day the other goes out. But the usual enjoyment of land employed in agriculture is to make an annual crop; which is not, ordinarily, the business of the whole year. But houses are not thus occupied for a part of the year, by those who lease them for the whole year. On the contrary, the rent is usually according to the period of occupation, and owners commonly go in themselves or put in another tenant, when a prior lease expires; so as to get the full enjoyment of their property. As there can be no presumption of possession under the lease to Eslick after June, it becomes necessary, in order to continue the possession afterwards, that something should have been done by Kinney, denoting that he was acting as owner and as owner in the enjoyment of the premises. It is said, that some time must be allowed for getting a suitable tenant. Admitting that there may be some interval between the expiration of one lease and the granting of another, during which it may not be necessary to shew any actual exercise of dominion by the landlord, yet it would be going much beyond the necessity for such indulgence, if allowable to all, to admit of so long an interval as occurred here. If a landlord be entitled to five months to find another tenant or a pur-

chaser, how can we say that he shall not have twelve or double that number if needed, to get a person that he deems suitable. It would really reverse the rule of law; for, instead of holding that the possession is according to the title, when there is no actual occupant, it would establish a rule, that when one person has once been in actual possession, he is to be presumed to continue so indefinitely, contrary to the fact, unless the owner enter and actually occupy. Without, then, going beyond the case before us, we hold it safe to say, that the hiatus between the two occupations of Eslick and the defendant, is too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by Kinney or any one under him.

PER CURIAM. Judgment affirmed.

ADOLPHUS D. JONES & AL. *vs.* ROBERT STRONG.

A conveyance of slaves is made to a trustee in trust for the sole and separate use of a married woman. The husband of this woman died, and she then by deed conveyed the slaves to A. *Held*, that A. acquired only an equitable title, and could not support an action at law to recover possession of the slaves.

The case of *Merritt* v. *Windley*, 3 Dev. 398, cited and approved.

This was an action of detinue for slaves. Plea, *Non Detinet*. On the 14th day of February in the year 1824, John Sneed and Alexander Sneed conveyed the slaves in controversy to John C. Mingas, to hold them in trust for the sole and separate use of Elizabeth Sneed, the wife of Alexander Sneed. On the 14th day of August in the year 1826, Elizabeth Sneed, then being a widow, made a

deed of gift of the said slaves to the plaintiff, reserving a life estate in the same to herself. The donor thereafter married the defendant, who took possession of the slaves. And notwithstanding the subsequent death of his wife, he now refuses to surrender them. The deed of gift to the plaintiffs, reserving a life estate to the donor in the slaves, was executed subsequent to the passage of our act of assembly, declaring such conveyances to be good and valid. The Judge was of opinion, that the donor of the plaintiffs had only a trust estate in the said slaves, and that her deed of gift, operated only as an assignment to them of her equitable interest in the slaves, to take effect after her death: That the legal title to the slaves was in Mingas, the trustee, and that he was the person to sue at *law* for the recovery of them. The plaintiff suffered a non-suit, and a new trial being refused, he appealed.

Kerr, for the plaintiff.
Morehead, for the defendant.

Daniel. J. The opinion of the Judge, given on the point of law appealed from, was certainly correct. This Court decided a similar question in the same way in the case of *Merritt* v. *Windley*, 3 Dev. 399.

Per Curiam. Judgment affirmed.

THE STATE TO THE USE OF J. AND W. PEACE vs. JAMES M. MANGUM & AL.

A person placed in the hands of a constable a note for $158 80 for collection, upon which the constable took out two warrants against the debtor, one for $80 and one for $78 80, as due by note, and the debtor appeared and confessed judgment before the justice according to the tenor of the warrants. Executions issued, and the constable failed to levy them on property subject to their satisfaction. *Held*, by the majority of the Court, RUFFIN, C. J. *dissentiente*, that the judgments, confessed by the debtor in the manner stated, were valid judgments; that he was estopped to deny their validity, and the constable was bound to use due diligence in collecting the executions issued on the judgments.

Held by RUFFIN, C. J. that as no note was shewn to have been in existence but the note for $158 80, of which the justice had not jurisdiction, the judgments were void, and that the confession of judgment by the debtor could not confer the jurisdiction or waive the want of it.

The case of *The State* v. *Stephens*, 3 Ired. 92, cited and approved.

Appeal from the Superior Court of Law of Wake County, at the Spring Term, 1846, his Honor Judge BATTLE presiding.

This was an action of debt upon a bond, given by one Fielding A. Belvin, upon being appointed a constable for the County of Wake, in February 1841, in which the breaches assigned were for the failure of the officer to collect two executions, which were placed in his hands for collection, and which, by the use of due diligence, he might have collected; for making a false return thereto, &c. The pleas were "*Non est factum*, conditions performed and not broken."

The relators, after proving, upon the trial, the execution of the bond by the defendants as sureties of Belvin, proved the receipt, of which a copy marked A. is sent as part of this case. They then introduced and proved the warrants, judgments, executions, and returns thereon, of which copies, marked B and C, are also sent as part

of the case. The magistrate, who gave the judgments and issued the executions, testified, that the judgments were confessed before him by Hinton, and that in entering them he acted upon that confession; that the constable had before him also a note, upon which, after the judgments were given, he wrote the word "Judgment," a copy of which note, marked D, is made part of this case. The magistrate testified further, that he handed the executions to the officer, at the time they were issued, and that, at that time, Hinton was living upon a tract of land which he had owned several years; and it was proved by other witnesses, that he then had in his possession about forty barrels of corn, three head of horses, and a small stock of cattle and hogs. The relators shewed further, that the land upon which Hinton lived was levied upon under an execution, issued on a judgment obtained in the County Court of Wake at the November term following, and the sum of one hundred dollars was raised by the sale of it.

The defendants then introduced and read in evidence the deed, a copy of which, marked E, is made part of this case. They also proved that the officer Belvin made sale of Hinton's personal effects, the latter part of April or the first of May 1841, and that he had then in his hands other executions, besides those in favor of the relators, but the executions were not produced on the trial, and there was no evidence given to show when they were issued.

The relators, in reply, introduced testimony to show that Nancy Ferguson, the grantee in the deed, was insolvent at the time it was given, and that she had never had any other property than the tract of land mentioned therein; and also that Hinton, before and at the time of making the deed, was greatly indebted and embarrassed, and so continued up to the time of the relator's executions, and soon thereafter was sold out and proved utterly insolvent; and that he always possessed and

used the land after, as he did before, the execution of the deed.

The defendants insisted, that the magistrate, who gave the judgments in favor of the relators against Hinton, had no jurisdiction of the cause; that therefore the judgments and the executions issued thereon were null and void, and consequently that the defendants were not responsible for any failure by the officer to collect the amount called for therein. But if this were not so, then they insisted, that the officer was not bound, for want or deficiency of personal property, to levy upon the land, without an indemnity being given or offered him.

The Court held that the judgments were not void, and that the officer was bound to use due diligence in the collection of the executions; that no indemnity was necessary to require him to levy on the lands, and, that, if there were a want of due diligence in making the amount of the executions out of the land and personal property, proved to have been in Hinton's possession, at the time when the executions were handed to him, the relators were entitled to recover the whole amount of the executions, or such part thereof, as might have been made out of such property.

The relators had a verdict and judgment, and the defendants appealed.

A.

Raleigh, 12th April, 1841. Received of Jos. and Wm. Peace, a note on Joshua R. Hinton in their favor for one hundred and fifty-eight dollars and eighty cents—bearing date 20th Feb. 1841, with interest from November 1840, for the purpose of collecting the same by dividing it into two judgments. All which I promise to do and make due return thereof to the said Joseph and William according to law. (Signed)

$158 50. F. A. BELVIN, Const.

B.

WARRANT.

State of North Carolina,
Wake County.

To any lawful officer to execute and return within thirty days from the date hereof, (Sundays excepted.)

You are hereby commanded to take the body of Joshua R. Hinton and him safely keep, so that you have him before me or some other justice of the peace for said county, to answer the complaint of Joseph and William Peace for the payment of the sum of eighty dollars due by note bearing interest.

Herein fail not. Given under my hand the 17th day of April, A. D. 1841.

(Signed) E. CHAPPELL, J. P.

Indorsed thereon judgment and execution as follows: "By confession of the defendant judgment is granted for eighty dollars. Given under my hand this 17th April, 1841, with interest from the 20th February last.

E. CHAPPELL, J. P."

North Carolina,
Wake County.

To any lawful officer to execute and sell so much of the defendant's goods and chattels, as will satisfy the above judgment and cost; for the want of goods and chattels, levy on lands and tenements.

E. CHAPPELL, J. P.

Officer's return endorsed in these words, "No property found." (Signed) H. A. BELVIN.

C.

The warrant, judgment, execution and return exactly like B. except that the amount of note in the warrant and judgment was $78 80 instead of $80.

D.

$158 80 with interest from 1st November, 1840. I, Joshua R. Hinton, promise to pay to Joseph and William Peace or order, the sum of one hundred and fifty-eight dollars and eighty cents for value received. Witness my hand and seal, the 20th day of February, A. D. 1841.

J. R. HINTON, (Seal.)

Across the face of which this entry appears: Judgment granted 17th April, 1841."

E. CHAPPELL, J. P.

E.

Deed of conveyance in the usual form in fee with covenant of general warranty from Joshua R. Hinton to Nancy Ferguson, stating the consideration to be $50 paid. Dated 18th April, 1840, proved 17th June and registered 22d June, 1840.

Badger, for the plaintiff.
McRae and *Manly*, for the defendant.

DANIEL, J. We have examined this case, and we concur with his Honor, that the judgments rendered and the executions issued by the Justice against Hinton, were good in law. Each of the warrants on its face appears to be for a debt due by note, and each note within the jurisdiction of a Justice. The defendant in these warrants, being summoned, appeared and confessed that he owed the debts in manner and form as was stated in each of the warrants. After this confession, the Justice had nothing further to do, but to render judgments against Hinton, upon his confession, that he was indebted to the plaintiff in the manner and form as stated in each of the warrants. It being a rule of law, that what is admitted need not be proved, the Justice was bound to give judgment for the plaintiff, without any other proof of the execution by Hinton of the two notes, mentioned in the face

of the two warrants. How can it then be said that the justice exceeded his jurisdiction? It is said, that the consent of Hinton could not give the justice jurisdiction of a matter, which the law did not. This is admitted. As, if the justice had issued his warrant in favor of the plaintiff for $158 80 cents with interest, and Hinton had then come before him and confessed a judgment for that sum, it would have been void, because the law did not give the justice jurisdiction of such a sum; and the assent of Hinton, could not in such a case have confessed jurisdiction. But what did Hinton consent to? He confessed to the justice, on trial, that he had executed to the plaintiff two notes, one for the sum of $80 00 and the other for the sum of $78 80, and he confessed judgments on the same. Was that not within the jurisdiction of the justice? And could the justice have refused to give the plaintiff judgment upon these admissions? It seems to us, that there was no other evidence necessary to substantiate the truth of the allegations made upon the face of each warrant, and that the justice had jurisdiction and was bound in law to render the judgments he did. Hinton was forever concluded by these judgments and executions; he never could have been heard to allege, that in fact he did not execute the two small notes, which he confessed to the justice he had executed. The constable ought to have used due diligence in collecting these executions. It appears, however, that he did not levy on the personal property of Hinton then in his possession—no other execution having a lien on it. It did not appear that there was a deficiency of personal property to satisfy the plaintiff's executions, so as to render it necessary for the constable to levy on the land. And it did not appear that the constable ever refused to levy on the land Hinton then lived on, unless he was indemnified; therefore, that part of the charge of the Judge, which ruled that no indemnity was necessary to require the constable to levy on the land, was not called for in the evidence of the

cause. We, however, are not disposed to say that it was erroneous. We think that this case is within the principle of the case of *State* v. *Stephens*, 3 Ired. 92. There, the small notes, which had been given by the obligor for the large one, were produced in evidence by the plaintiff; here, they are confessed to be *in esse* by Hinton, the alleged maker of them; therefore their production was not demandable by the justice. The judgment must be affirmed.

Ruffin, C. J. Although the relators might have an action against Belvin on his engagement to divide the debt, so as to take two judgments for it, yet they could not recover on his official bond for neglecting to collect the note for $158 80. For the construction of the act, *Rev. St. c.* 24, *s.* 7, is, that a constable's sureties are responsible for his faithfulness in such agencies, and such only, as relate to debts which might be recovered by suit before a single magistrate; which is not the case with this bond.

To get clear of that difficulty, the relators say that their debtor, Hinton, gave two new notes in the place of the old one, on each of which, the one for $80, and the other for $78 80, he confessed a judgment; and that it was the duty of the constable to collect those judgments, and for his neglecting to do so that his sureties are liable. Of that opinion are my brethren; and it is my misfortune again to think by myself.

The point depends upon the question, whether the justice of the peace had jurisdiction in the cases; for, if he had not, they were *coram non judice*, and the judgments had no efficacy. It appears to me that the justice had no jurisdiction. In the first place, it is absolutely false that two new notes were given for sums within the jurisdiction of a magistrate, as supposed in the warrants. In point of fact, two warrants were brought for different parts of the money due on one bond, which, in the whole,

exceeded the jurisdiction of the justice; though, if it had been divided and new notes taken therefor, as supposed in the warrants, they would have been within the jurisdiction. Now, I think that which was actually done in the case, could not legally be done. The rule of the common law was, that judgments of inferior tribunals must appear affirmatively to be given on a case within the jurisdiction. In England, it would have been necessary, not only that the warrant should purport to be issued for a debt due on a bond, but also that the magistrate should adjudge that it was thus due; and then, if it turned out to the contrary, the judgment would not bind the party. *Moravia* v. *Sloper*, Will. Rep. 30, *Herbert* v. *Cook*, Id. 36, note, *Morse* v. *James*, Id. 122. That is now very much altered by statute in England, 2 *Chitt. Gen. Prac.* 130, *and Seq.*; and I admit that it is otherwise here by force of the provisions in our statutes, which sustain the proceedings of justices, notwithstanding defects of form, and give an appeal from them to the Courts of record. If, upon the face of the proceedings, there is not an apparent defect of jurisdiction, we presume its existence, until the contrary be shewn. But the rule can be changed no further, as it seems to me; for I think it cannot be possible, that a justice of the peace here can confer on himself a jurisdiction in a cause, by adjudging that a debt is due on a bond for $80, when in fact the amount of it was $158 80, and it was due on a bond for that sum or on promises. Although there is a presumption in our law in favor of the judgments of justices, yet when it appears affirmatively, upon proof, that a judgment was rendered upon a case—the actual subject matter not within the justice's jurisdiction—I hold it to be void, just as much as if the excess of jurisdiction appeared in the adjudication itself. If it be not so, it is in the power of an inferior magistrate to draw every case before him, by untruly adjudging the facts necessary to constitute his jurisdiction; and the only remedy would be by

appeal or writ of false judgment, upon which the party would be compelled to give security for the debt. Thus it may be shewn upon evidence, that a judgment rendered upon confession, by a justice of one County, which purports to have been rendered in the justice's proper County, was in fact given in another County; and thereupon it shall be adjudged void, so that no action will lie thereon. *Hamilton* v. *Wright and Parish*, 4 Hawks 283. It must be so in respect of the question of jurisdiction; otherwise it would be vain for the Legislature to attempt to limit it. The restriction can ever be evaded by bringing a case colorably within the jurisdiction, if that would do.

The act says that "debts due on bonds, when the principal does not exceed $100, shall be cognizable and determinable before one justice of the peace out of Court." Larger debts due on bonds are not cognizable before him; and if he assume a jurisdiction over such, his acts are void. On no proof that could have been offered in this case, consistent with the truth, could the justice have given a valid judgment for the relators. But it is said, that proof was dispensed with by the confession of the judgments by the debtor, and that thereby he admitted that such bonds were given, as were stated in the warrants, and concluded himself as to that point. But I think the confession makes no difference, in respect of the point of jurisdiction; for it was still a judgment of the justice, that the sum for which it was rendered, was due upon a bond for that amount. The confession dispensed with *proof* of the bond by witnesses. But it could not dispense with the *production* of the bond—of some instrument purporting to be a bond—of Hinton, for a sum within the justice's jurisdiction, as supposed in the warrant; for the jurisdiction is of debts of $100 or under, *due on bonds*, that is, on bonds actually existing. An admission to that effect, contrary to the fact, in order to give a jurisdiction to a justice, cannot enlarge the

jurisdiction, because it is limited by the law. To say, then, that Hinton was concluded by the judgments and estopped to deny their sufficiency, is assuming the whole matter in debate. For if the subject matter, as in fact existing, was not within the jurisdiction of the magistrate, he could not take the confession, nor give judgment on it, and those acts were void; and void judgments, like other void acts, estop nobody. The restriction upon the jurisdiction is imposed as a matter of public policy, and not as a privilege to the debtor. Therefore the debtor cannot waive a defect of jurisdiction, and an attempt to do so by an admission that he had given two bonds, each for less than $100, when in truth there was but one, and that one for more than $100, and all this known to the justice of the peace, is a concerted fraud upon the law, which ought not to be tolerated. Such an admission cannot shield the proceedings from an investigation into their validity, by any estoppel alleged to arise out of the proceedings themselves, as to one of the parties to the fraud. Here one's eyes cannot be shut, so as not to see that the fact is, that the two warrants were brought for the debt due on the one bond for $158 80, notwithstanding the gloss put on it by the magistrate in saying, that in entering the judgments, he acted on the confession—meaning to insinuate, that he took no note of the bond itself. Then why did he take it? Why did he attempt to cancel it by writing as usual, "Judgment," on the face of it? Why did he not ask for the other bonds, on which the judgments were rendered, if any such he supposed to exist, besides that one for the sum of $158 80. The act of 1794, *Rev. St. c.* 62. *s.* 16 requires, when a justice's execution is levied on land, that he shall return it "with all the papers on which the judgments was given" to the County Court. Why are the papers to be returned? No doubt, that it may appear therefrom that it was a case within the Justice's jurisdiction, so that the

Court may order a sale thereon, and the purchaser get a good title. I believe justices never give judgment on a bond, without having it produced and cancelled, unless it may be in the case of a lost bond. That exception stands on peculiar grounds, which leave the general rule unimpaired: for the justice finds impliedly, if not expressly, the loss of the bond as well as its execution. But in other cases they ought to, and do, require the bond to be produced as the source of their jurisdiction. In this case, the magistrate, no doubt, considered that he was doing so, when he took the bond for $158 80; and if so, he must have intended to give the two judgments on it. It seems to me, that is not sustainable. The case has been compared to *Stephens' case*, 3 Ired. 92, and said to be within the same principle. But it appears to me, that no two cases could be more unlike. There a creditor put a bond for $125 25 into a constable's hands for collection, and he took a new bond for $80 and entered a credit therefor on the first one, and then took judgment on the new bond and for the balance due on the other. There the jurisdiction did not exist colorably, merely, but it existed in fact, as there were two bonds actually, and each was within the cognizance of a justice. But here there is no such bond as either of those set forth in the warrants. It was said, indeed, that the difference is merely a matter of form, and that it is useless to require new bonds to be actually given, as it is just as easy for the debtor to give two bonds as to confess two judgments. But surely that is not a lawyer's answer to an objection of the want of jurisdiction, founded upon a statute which fixes a restricted jurisdiction of an inferior tribunal by the form of the securities for the debt and the just amount of the debt, according to the different kinds of securities, as bonds and notes, liquidated or unsettled accounts. It is easy to give notes for sums of less than $100. Then let them be given, if the parties wish to go before a justice of the peace for judgment: for without them the

law gives no authority to a single magistrate to take cognizance of them. Here they were *not* given, and therefore there was no jurisdiction. If a suit were brought upon the bond for $158 80, what defence could be made to it? It could not be pleaded, that the relators took from the debtor his two bonds in satisfaction of it, for in fact there never were any such bonds. Nor could he plead the former judgments thereon; for as judgments on it, they were void. So that if their judgments are good by force of the form of the warrants, and the confession of the judgments, both that bond and the two judgments are subsisting securities for debts against Hinton: which I think cannot be. I am of the opinion therefore that the judgment ought to be reversed.

PER CURIAM. Judgment affirmed.

PHILIP BEEKER *vs.* JOHN SAUNDERS.

A., on the 21st of August 1841, transferred to B. certain promissory notes of C., which he at the time guaranteed. B. made no application to C. for the payment of the notes until the 29th of July 1842, and gave no notice to A. that the notes were unpaid, and he should hold him responsible on his guaranty, until the 29th of February 1844. *Held*, that B. had been guilty of such *laches* as to discharge A. from his guaranty.

The cases of *Towns* v. *Farrar*, 2 Hawks 163, and *Grice* v. *Ricks*, 3 Dev. 62, cited and approved.

Appeal from the Superior Court of Law of Davidson County, at the Spring Term, 1846, His Honor Judge SETTLE presiding.

The plaintiff, on the 23d day of April, 1841, received of the defendant, for bacon sold him, two notes then due on Alexander Shammell. The defendant guaranteed the notes to be good, and Shammell's estate was then considered to be good. The plaintiff did not, however, demand the money, due on the notes, until the 29th day of July,

1842. The plaintiff gave notice to the defendant, on the 29th day of February, 1844, that he was looked to for the money. The defendant refused to pay: and the plaintiff brought this action of assumpsit upon the said guaranty. The jury found these facts in a special verdict, referring the questions of law to the Court. The Judge was of opinion, on the facts found in the special verdict, that the plaintiff had been guilty of *laches* and the defendant was discharged from his guarantee. Having pronounced judgment accordingly, the plaintiff appealed.

Mendenhall, for the plaintiff.

No counsel for the defendant in this Court.

Daniel, J. A guaranty, is a promise to answer for the payment of some debt or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance, *Fell on Guar.* 1, *Smith on Mercantile Law*, 277. The Judge was of opinion, that the *laches* of the plaintiff had discharged the defendant. And we concur with his Honor. It does not appear in the verdict, that the plaintiff ever demanded the money, due on the notes of Shammell's representatives, for more than fifteen months after he had received them. Nor did he give notice to the defendant, of his inability to get the money out of Shammell's estate, until Feb. 1844, almost three years after he had received the notes upon the guaranty; and when the law demanded of him, to resort to a reasonable degree of diligence, and that too in such time as a prudent and discreet man would in like circumstances use, to collect his own debts. And if he then fail to obtain satisfaction of his principal, he is entitled to resort to his guarantor, on his first giving him notice in a reasonable time, that he is looked to for payment of his guaranty, *Towns* v. *Farrar*, 2 Hawks 163, *Grice* v. *Ricks*, 3 Dev. Rep. 62. The judgment must be affirmed.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF HIRAM WARD *vs.* JOHN SAUNDERS.

In the case of the return of the levy of a justice's execution on land to the County Court, though notice is directed by law to be given to the defendant, no evidence is required of that notice, but the record of the County Court, ordering the *venditioni exponas.*

The description in the return of a constable of a levy on land, need not literally comply with the act of Assembly in such cases, its requirements being substantially, that the land should be sufficiently distinguished and identified

When the original records are offered in evidence in the Court to which they belong, they should be received, because the Court is presumed in law to know its own proceedings; but in another Court, the proper evidence is a copy of the record, authenticated by the seal of the Court.

In the case of a return, by a justice, of a levy on land, with the corresponding papers, it is not necessary that it should appear, by a distinct certificate of the Clerk, that these papers have been enrolled in bound books, as required by the act of Assembly. The ordinary copy of the record, certified by the Clerk under the seal of the Court, is sufficient evidence of the enrolment.

The declarations of a person, who has executed a deed, at a period subsequent to such execution, are not evidence against the grantee. But the declarations of a grantor, between the time when the deed falsely bears date, and the time when it was actually executed, are evidence as to the fraudulent intent of the parties.

The cases of *Burke* v. *Elliott*, 4 Ired. 355, *Smith* v. *Low*, 2 Ired. 457, and *Blanchard* v. *Blanchard*, 3 Ired. 105, cited and approved.

Appeal from the Superior Court of Law of Davidson County, at the Spring Term, 1846, his Honor Judge SETTLE presiding.

This was an action of ejectment for a tract of land, which both parties claimed under Isham Doby; the lessor of the plaintiff under a deed from Doby to him, bearing date the 23d of April 1840; and the defendant, under a purchase at a sale under execution against Doby, and a sheriff's deed the 2d of November 1841, as hereafter mentioned.

The defendant alleged, that the conveyance to the lessor of the plaintiff, (who was the brother-in-law of Doby and did not appear to have paid anything for the land,) was ante-dated, and was fraudulent as against Doby's

creditors, and void. The defendant then gave in evidence the records in four cases in the County Court of Davidson, some at the instance of the defendant, and others at the instance of other persons, against Doby; from which it appeared, that, in February and April 1841, four warrants had been commenced against him, on which judgments were rendered and executions issued on the 4th of June thereafter, on each of which the constable returned—"No goods or chattels to be found: levied on the lands and tenements of Isham Doby, adjoining the land of Allen Newsom, Claiborne Newsom and others, and containing 190 acres." Upon that return, judgments were rendered and orders for sale made in the several cases at August term 1841; and thereupon, writs of *venditioni exponas* were issued, under which the sale was made to the defendant. The plaintiff's counsel objected to receiving the records in evidence, because it did not appear that the proceedings had been recorded in a well-bound book, kept for that purpose. The plaintiff then produced the original warrants, judgments, justices' executions, and constables' return, with the endorsements thereon, "Recorded in minute docket, February 1843," in the hand-writing of the Clerk of the County Court. The counsel for the plaintiff still objected to the evidence, and insisted that it ought to appear, by the minutes of the County Court, that the papers had been recorded therein. But the Court received the evidence. The defendant then proved by one Smith, who is one of the subscribing witnesses to the deed from Doby to Ward, that it was not executed on the 23d of April 1840, as it purports on its face to have been; and that, although the witness could not recollect precisely when it was executed, it was certainly not before September in the year 1840, as the witness knew from the fact, that he attested the deed after he came to reside in Davidson County, which was not until September 1840; and the defendant proved by other witnesses, that the deed from Doby to the lessor of

the plaintiff was not made until April 1841. And thereupon the defendant offered to prove declarations made by Doby between April 1840 and April 1841, that he was, at the time of making such declarations, the owner of the premises in dispute, but that he intended to convey them to the lessor of the plaintiff, in order to defeat the defendant and his other creditors aforesaid of their debts, and in trust for himself. To the evidence thus offered, the counsel for the plaintiff objected, for the reason, that it would tend to invalidate the deed made by Doby himself, which purported to be made on the 23d April 1840, and therefore ought not to be affected by his declarations, made after that day. But the Court received the evidence.

The counsel for the plaintiff then objected, that the return of the levy by the constable was defective, because it did not follow the words of the act of Assembly upon that subject. Thereupon, the defendant gave evidence that there was not a water-course within the land in dispute, and that it would easily be identified and known by persons residing near it, from the description in the returns. The Court instructed the jury thereon, that it was not necessary the levy should be in the words of the act, and that, if the evidence satisfied them, that the description in the return identified the land as effectually, for the information of bidders and others, as if all the terms of the act had been used, it was sufficient.

The counsel for the plaintiff further objected, that the orders of sale were void, because the defendant had not proved that notice had been given to Doby of the several levies and the intention to move for judgments thereon. But the Court held, that the judgments and orders of sale in the County Court were sufficient, without further proof of such notices.

The jury found for the defendant, and judgment was rendered thereon, and the plaintiff appealed.

Mendenhall, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. That no further evidence of the service of notice, as required by the statute, *Rev. St. c.* 45, *s.* 19, is requisite, besides that contained in the record itself, was decided in *Burke* v. *Elliott*, 4 Ired. 355, which disposes of the last exception.

Upon the other objection, as to the sufficiency of the return of the levy, the cases of *Smith* v. *Low*, 2 Ired. 457, and *Blanchard* v. *Blanchard*, 3 Ired. 105, are in point to sustain the opinion given by his Honor. It was held in those cases, that the construction of the act did not imperatively require, that it should be literally followed, provided it appeared upon evidence, that the description given was equivalent to that prescribed as the means of distinguishing and identifying the parcels.

It is a very common practice for gentlemen of the bar, for the convenience of themselves and their clients, to use, as evidence, the original documents and minutes, instead of the record as finally made up or supposed to be made up from them, or a copy from it, as enrolled. When the evidence is offered in the same Court in which the proceedings were had, no difficulty can occur; because the Court knows its own proceedings and records, and can *instanter* order the enrolment, and give the parties the benefit of it, in its complete state. When the proceedings are in one Court, and they are offered as evidence in another, regularly the original documents or minutes, which may need evidence to identify them, are not evidence, but only the record made up or a copy from it, authenticated by the seal of the Court. This we had supposed to be so perfectly understood, that no one would think of objecting, that it did not appear from the originals and minutes (when admitted by consent,) that they were not enrolled or recorded, as it is called; or would absurdly require, that it should be shewn by the enrolment that they had been enrolled, when, in truth, those

documents by consent are received instead of the regular roll itself. In this case, the objection is, that it did not appear in evidence that the proceedings, had before the justice, had been recorded by the Clerk in a well-bound book, as directed by the act of 1794, *Rev. St. c. 62, s. 16*, which it seems to have been supposed could only appear by the minutes of the County Court. But, whether the proceedings were recorded or enrolled, could, in this case, as in every other, appear only from the enrolment, or a copy duly certified under seal, and could not appear from the minutes.

For the direction to record these proceedings in a well bound book is nothing peculiar, but is only providing that they, although originating before a justice out of Court, shall when returned to Court and made the foundation of an adjudication there, be enrolled for their preservation, as the process, pleadings and other proceedings are in other cases. Therefore, when a copy of the record of the County Court, or what purports to be such record, is produced, it establishes that every thing therein appearing is enrolled; for that is in truth the copy of the enrolment in legal parlance. Hence after reading in evidence the transcript from the County Court in this case, it was superfluous to produce the originals with the clerk's memoranda on them, to let it be seen therefrom, that they had been recorded: for they were not evidence at all of any any such thing, whereas the other was the thing itself or a copy of it. But if only the originals and minutes were read, as they were not objected to on the grounds of their being such originals and not the record technically, it must be understood, that they were received by consent, as evidence of every thing that would appear in the roll, when regularly made up from them; and the objection, as being incompatible with such consent, would then be properly over-ruled. In every point of view, therefore, the decision of his Honor was right.

It is a well settled rule of evidence, that the declara-

tions of a person, after he has made a deed, cannot be received to impeach it, because they were made when he had no interest in the subject, and it would be unsafe and unreasonable, that the interests of another person should be attacked by them. It is also true as there is, *prima facie*, to be a presumption of truth and fairness in all transactions, that the date of a deed is to be taken as the time of its creation, until there be evidence to the contrary. But in the present case it is stated as a fact, that the date of the deed was not that of its execution—but about one year prior to it—and it was contended, that the declarations of Doby, of a fraudulent purpose to execute to Ward a deed in trust for himself and give it a false date, could not be received, because, though made before the deed was actually executed, they were made after the time the deed falsely purports to have been executed. Such a position is perfectly preposterous, as it would make fraud a complete protection to itself, and enable admitted falsehood to exclude the truth. If the deed had been dated truly, it would have afforded no pretence for excluding the declarations of Doby through 1840, of the purpose to make a voluntary conveyance to his brother-in-law, because he was then the owner and possessor of the land. Then it is impossible that those declarations, thus made, while he was the owner and possessor, should lose their competency and effect by the subsequent execution of a deed in April 1841, and giving it the false date of April 1840. After the evidence as to the time of making the deed, the Court properly received the declarations, for the purpose of directing the jury to enquire of the true time of the execution of the deed, and, further, to disregard such declarations as were made after the day on which they should find the deed was executed, but to take into their consideration those made before the execution of the deed as evidence, to be weighed by them, of the *bona* or *mala fides* of the transaction.

Judgment affirmed.

DAVID C. GUYTHER *ex.* JOHN C. PETTIJOHN.

When there are two part owners of a chattel, and one of them, without the assent of the other, *destroys* the chattel or renders it *useless by use*, the former is liable in damages to the latter for the value of his share.

In such a case no demand is necessary before bringing the action.

The case of *Lucas* v. *Wasson*, 3 Dev. 398, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

This was an action of trover, brough to recover damages for the conversion of two fishing seines. Plea, "Not guilty." In the year 1841, the seines belonged to John Bennett and F. Fagan, as partners in the business of fishing. In August 1842, Fagan conveyed his interest in the two seines to the plaintiff. Bennett, who had the possession of the property, died in December 1842; and his executor, on the 31st day of January 1843, sold one of the seines to the defendant at public sale—the plaintiff then and there objecting and setting up his title to a half of the said seines. The plaintiff, however, afterwards withdrew his objection, saying "that he would be entitled to his part." At a future day, the executor sold to the defendant the other seine, at private sale. The plaintiff was not then present, nor did he give any assent to this sale. The defendant used the seines in fishing, up to the bringing of this action, which was on the first day of May in the year 1845.

The defendant insisted, *First*, that he and the plaintiff were tenants in common, and that one tenant in common could not maintain an action of trover against his cotenant, for an injury done to the property held in common. And *secondly*, that the plaintiff should have made a demand, before he commenced his action. The Court charged the jury, that if the plaintiff assented to the sale made by the executor of Bennett, he could not recover in this action of trover, for a conversion of any of the *property then sold*. And that, if there was no assent,

then the plaintiff could not recover, unless they further found, that the defendant had in fact *destroyed the seines*, or that they had been rendered *useless by use*, before the bringing of the action. And if that fact was proved against the defendant, then the defendant would be entitled to recover one half of the value of the seines in damages. The Court further instructed the jury, that a demand before the bringing of the action was not necessary. The jury found a verdict for the plaintiff—a motion was made for a new trial, and it was refused. Judgment was then rendered; from which the defendant appealed.

Heath, for the plaintiff.

No counsel for the defendant.

DANIEL, J. The Court told the jury, that if the plaintiff assented to the sale of his interest in the seines, or either of them, then he could not recover, in this action, for a conversion of that property, which he had assented should be sold. The jury have by their verdict negatived any assent to the sale of the plaintiff's interest in the seines. The case then, it seems, turned altogether upon the ground, whether the defendant had destroyed the seines, or whether he had rendered them *useless by use*, before the action was brought. The original owners had been fishing as partners, one or two years before the sale to the plaintiff by Fagan. But whether they had used either of these two seines during that time, does not appear in the case. But the evidence does shew that the defendant had in fact used these seines in fishing, for three springs, from the sale to him up to the bringing of the action. There was, therefore, evidence to be left to the jury, as to the *destruction* of the seines by the defendant, or as to his rendering them *useless by use*. The law, we think, was correctly stated to the jury by the Court. *Lucas* v. *Wasson*, 3 Dev. 398.

PER CURIAM. Judgment reversed.

JOSEPH G. GODFREY *vs.* JAMES LEIGH.

Under our statute of Usury, *Rev. St. c.* 117, the reservation of usurious interest makes the contract void, but it does not incur a forfeiture. The forfeiture is incurred only by taking usurious interest, as such.

Although there be a corrupt agreement for excessive interest, when the money is advanced, yet no action lies for the penalty, until some illegal interest has been received.

So, on the other hand, if the contract was not for excessive interest, but the lender afterwards receives it, he forfeits double the sum lent.

If a bond be given upon an usurious consideration, and a new bond of the borrower is afterwards substituted for it, the offence is not committed so as to subject the lender to the penalty, until the second bond be paid.

But where the debtor does not give his bond, merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as a payment, it is a payment in law, as well as in the common understanding of men.

A payment in money's worth, received as a payment, is considered in law to be the same as a payment in cash.

A contract for usurious interest may be laid, in a declaration for the penalty, as of the day when the illegal interest was paid.

The cases of *Brisendine* v. *Martin*, 1 Ired. 286 and *Ligon* v. *Dunn*, 6 Ired. 133, cited and approved.

Appeal from the Superior Court of Law of Perquimons County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

This is an action of debt founded on the statute of Usury. The declaration contained two counts, but all the evidence was directed to the first, and on that the judgment was rendered for the plaintiff. It demands $693 08 and lays the case thus: That on the 23d of March, 1842, at, &c. upon a certain corrupt contract then and there made, between the defendant and the plaintiff, the said J. L. took, accepted and received of and from the said J. G. the sum of $124 03, by way of corrupt bargain and loan, for the said J. L. forbearing and giving, and having forborne and given day of payment, of the sum of $346 54 therefor, viz. on the first day of January 1841, at, &c. lent and advanced by the said J. L. to the said J. G. from the said 1st day of January 1841, until

the said 23d of March 1842; which said sum so taken &c. exceeds the rate, &c. Pleas: *nil debet*, and statute of limitations.

This action was brought on the 1st of March 1845. On the trial the plaintiff produced one Sawyer as a witness, who stated that the plaintiff applied to the witness to assist him to borrow a sum of money; and that on the 1st of January 1841, he applied, on behalf of the plaintiff, to the defendant to lend the plaintiff the sum he needed, and offered, if he would, to transfer to him a bond, which he, the witness, then held from the present plaintiff to the witness for the sum of $382 70, bearing date the 12th of September, 1839, and due one day after date; and that the defendant agreed to take the said bond and advance the amount thereof, to the plaintiff, deducting 16 per cent. from the amount of the principal and interest thereon: That this was communicated to Godfrey, who consented to take up the money on those terms: And that then, the witness, and Godfrey, and Leigh, being together, he, Sawyer, competed the sum due on the bond and ascertained that the nett proceeds of it, after deducting the 16 per cent, was $346 54; and the defendant then handed to him that sum and he immediately handed it to Godfrey, all three of them at the time sitting at the same table. The witness upon cross-examination stated positively, that he did not borrow the money, nor sell the bond to the defendant, but that Godfrey did, and the defendant understood it so—though he said, that, if the defendant had not taken the bond and advanced the money, he, the witness, would have carried the bond home as his own, as Godfrey only wished to borrow the money in case he could raise the money on it. He also stated, that the plaintiff again gave to the witness his bond, for the sum due on the bond transferred to the defendant: and that on the 23d day of March, 1842, the plaintiff re-paid to the defendant the said sum of $346 54, and also the further sum of $124 03 in discharge of the said bond, which

the defendant then delivered to Godfrey, as satisfied. But he stated that the payment was not made in cash, but was made in a bond executed by one Reed to Godfrey, for a larger sum which Leigh accepted from the plaintiff in payment of the said debt, and the excess of Reed's bond above this debt was applied as a credit on another debt, which Godfrey owed Leigh.

The counsel for the defendant insisted, that, as the bond of Godfrey was payable and belonged to Sawyer, until the latter transferred it to the defendant, the transaction was a sale of the bond by Sawyer to Leigh; and, secondly, that if Sawyer lent the bond to Godfrey, the obligor, it thereby became extinguished; and that though, Leigh might have lent the money to Godfrey, yet it would not be usurious, because the bond had ceased to be binding; and, thirdly, that as the bond of Godfrey to Sawyer was good in its inception, the discounting it at the rate of 16 per cent. constituted usury and the offence was complete when the money was advanced on the 1st day of Jan. 1841; and, fourthly, that if the last position should not be true, then no action had yet accrued, as it did not appear that the defendant had received payment of Reed's bond.

The Court instructed the jury, that if, in their opinion, the defendant purchased the bond from Sawyer, and paid him or the plaintiff the money, the plaintiff could not recover. But if, in their opinion, Sawyer applied to the defendant to borrow the money for Godfrey, and explained to him that he was willing to let Godfrey have the use of the bond, provided he could raise the money on it from the defendant, and that thereupon the defendant agreed to advance to Godfrey, as a loan, the amount of the bond, deducting 16 per cent., and did pay the same into the hands of Sawyer on 1st of January 1841, viz. the sum of $346 54, as a loan for Godfrey and to be paid to Godfrey, and took from Godfrey, through the hands of Sawyer, the bond of Godfrey for $382 70; and that on the

23d of March 1842, Godfrey paid the defendant on the said contract, the sum of $470 50—being $124 03 for the use of the money from the 1st of January 1841, to the 23d of March 1842—it was usurious, and the defendant forfeited double the sum so lent by him.

The Court further instructed the jury, that the penalty was not incurred by making the loan to Godfrey, but only receiving usurious interest thereon, which was not until the payment on the 23d of March 1842; and therefore the statute of limitations was not a bar.

And lastly, the Court told the jury, that if the defendant took and accepted from Godfrey the bond of Reed, payable to Godfrey, and by him transferred to the defendant, as payment of the sum lent by the defendant to Godfrey, and the usurious interest thereon, it was the same as if the payment had been in money.

Heath, for the plaintiff.

As to the first point, it is not necessary, in actions on the statute of usury, to set out the *time* of the corrupt *contract*, as distinct from the *time* of *lending*: all that is required to be set forth in the declaration, is, that the time of the corrupt contract *or* lending shall be correctly stated. *Comyns on Usury*, 231, 232. The time of the contract, and the time of the loan, are one and the same thing. Here, the time of the loan is correctly set forth: even were the declaration defective, in this particular, as all the facts appear of record, it would be a proper case for amendment, in this Court. *State* v. *Muse*, 4 Dev. and Bat. 319.

2d. The second objection is covered, by the finding of the jury for the plaintiff. The jury have found, that the note of Godfrey was passed to the defendant Leigh, by Godfrey, and not by Sawyer, the witness; and there being evidence to this effect, the defendant is concluded by the finding.

3d. Without prejudicing his case, the plaintiff may ad-

mit, that Godfrey's note or bond was extinguished by this transaction, as contended by defendant, in his third objection; for the case would then be nothing more nor less, than a loan of $346 54 by Leigh to Godfrey, and a receipt of usurious interest thereon.

4th. As to the fourth objection, it is to be remembered, that there is a marked distinction between the avoiding of a contract infected with usury, and the accruing of the action for a penalty, under the statute; the *contract* is declared void; the penalty does not accrue till the receipt of usurious interest thereon. *Comyns*, 222, *and Seq. Chitty on Contracts*, 711. The usurious interest, in the present case, was received on the 23d March 1842, at which time the action accrued, and having been brought within three years thereafter, the action is not barred.

5th. In the last objection, it is urged, *that the action has not yet accrued*, inasmuch as the debt and usurious interest were received in Reed's note or bond, which note or bond does not yet appear to be paid; and therefore, Leigh has received nothing, either of principal or interest. Without adverting to the inconsistency between this and the objection just disposed of, an answer to it may be found, in this—that Leigh *received* Reed's note or bond, *as payment;* and, as the note or bond was valuable, in itself, (*Brisendine* v. *Martin*, 1 Ired. 286,) and, particularly, as the case states, was *received* as *payment*, it must be considered as a payment of the debt and interest, *at that time*, though not in cash, and the action accrued at the date thereof.

A. Moore, for the defendant.

Ruffin, C. J. Whether the transaction was in fact a purchase of the bond of Godfrey by the defendant from Sawyer, or was a loan to Godfrey himself, was fairly left to the jury, and has been found against the defendant.

Taking it then, to have been a loan to Godfrey, it seems clear, that all the opinions delivered by the Court were correct. That the bond was good in the hands of Sawyer, or that it was good, or not good as a security in the hands of Leigh, can make no kind of difference, as to the liability of the defendant. For there is a clear distinction between the part of the act which avoids the agreement or securities, and that which gives the penalty. The reservation of usurious interest makes the contract void, but it does incur a forfeiture. The forfeiture is incurred only by taking usurious interest, as such. Therefore, although there be a corrupt agreement for excessive interest when the money is advanced, yet no action lies for the penalty, until some illegal interest has been received. So, on the other hand, if the contract was not for excessive interest, but the lender afterwards received it, he forfeits double the sum lent. *Rex* v. *Allen*, 1 Mod. 69, Sir Tho. Raym. 196. *Floyer* v. *Edwards*, Cowp. 114. *Fisher* v. *Bearly* Dougt. 235. So if the bond could be supposed to be extinguished because Sawyer appeared to let Godfrey have the benefit of it in this manner, it would not be material: for every security for an usurious loan is void, and yet, if illegal interest be paid on it, the penalty arises.

As to the statute of limitations, it is clear that it did not begin to run, until the payment of the debt on the 23d of March 1842. However it might be, if the bond had been discounted for Sawyer, and less than the sum due on it for principal and interest had been paid to him, yet as in this case the loan was to Godfrey of a certain sum of money, as found by the jury, and Godfrey's bond was transferred to Leigh by Sawyer, merely as a security, no interest can be considered as having been kept back or as taken by Leigh, as such, before he received the payment in 1842.

It is true, that if a new bond be substituted for one that is usurious, the offence is not committed, so as to subject the lender to the penalty, until the second bond

be paid. But when the debtor does not give his bond merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as payment, it is a payment in law as well as in the common understanding of men. Bullion, taken at an agreed price, may be stated in pleading, as so much money lent or paid. *Barbe* v. *Parker*, 1 H. Bl. 283. So payment in money's worth, as a horse, bank notes, the note of a third person, and the like, was said in *Brisendine* v. *Martin*, 1 Ired. 286, to be the same as cash. And lastly, in *Ligon* v. *Dunn*, at the last term, the Court held, that the acceptance by an obligor of a bank check, in payment of a bond, supported the plea of payment in debt on the bond.

It has been further objected in arrest of judgment, that the declaration is defective in not setting forth the day of making the corrupt contract. But, it seems to be sufficient in that respect, following literally, we believe, the precedent given in 2 *Chit. Pl.* 514, or the common count for usury under the *St.* 12 *Anne*. It omits all the transaction previous to the 23d of March 1842, except the loan of the money on the 1st of January 1841, (which it may be supposed was made fairly,) and then it alleges that the defendant took, on the 23d of March 1842, upon a corrupt bargain then made with the plaintiff, the sum of $124 03, by way of unlawful interest. Now, we have seen, that if, upon a good agreement, usurious interest be afterwards received, the offence is consummated, and therefore it is plain, that the very fact of paying and taking the usurious interest constitutes an agreement for it, and that it may be laid as such, and, consequently, laid as of the day when the illegal interest was paid.

Judgment for the plaintiff on the first count of the declaration affirmed.

PER CURIAM. Judgment accordingly.

THE STATE, TO THE USE OF JAMES MURPHY AND WIFE AND OTHERS *vs.* WILLIAM R. McKAY & AL.

A single suit upon an administration bond may be brought by more than one of the persons entitled to distribution of the intestate's estate, as relators.

The Court, when the suit is at the instance of more than one relator, will adopt such rules as may be necessary to prevent injustice to the defendants, either as to the mode of declaring, the breaches assigned, the pleadings, the trial or the costs.

The case of *Williams* v. *Hicks*, 1 Murph. 437, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Spring Term, 1846, his Honor Judge DICK presiding.

The following facts were presented by the case transmitted to this Court.

Munroe Treadwell died intestate, leaving several next of kin; and the defendant McKay became his administrator, and together with the other defendants, as his sureties, entered into a bond for the due administration of the estate. The present action is debt brought thereon, and the declaration contains three breaches: the first, that the administrator refused to pay to the relators, Murphy and his wife, the distributive share of the residue of the estate, remaining in his hands after the payment of the debts of the intestate and making all just allowances to the administrator, which belonged to her as one of the next of kin of the estate. The second breach and the third were like the first, except that the one was for not paying the share of the residue belonging to Owen G. Treadwell, who is another of the next of kin and also one of the relators; and the other for not paying the share of Shadrack Wooten, another of the next of kin and of the relators. The defendants pleaded *non est factum*, and to each breach payment of the sum specified in it to the particular relator. On the trial of the issues the counsel for the defendants objected, that the action would not lie at the instance of the three relators for their several dis-

tributive shares, and moved the Court to non-suit the plaintiff. The Court did so accordingly, and from the judgment the relators appealed.

McRae, for the plaintiff.
Strange, for the defendants.

Ruffin, C. J. Without regard to the form in which it is presented, the Court supposes the single question to be whether the action is well brought, and therefore has considered that alone.

Next of kin take distinct shares, and unequal balances may be due to the several persons, who make up that class. The argument for the defendants is, that these three of the next kin are separate creditors of the administrator, and therefore that one action cannot be brought for the benefit of all of them. There is no doubt, that each creditor or next of kin may prosecute a separate action "and recover damages for the breach to his prejudice, until the penalty of the bond be exhausted." It is the express purpose of the act, *Rev. St. c.* 46, to give to any "person or persons" the right to prosecute "a suit or suits in the name of the State" on an administration bond, and "recover all damages which he, she, or they may have sustained by reason of the breach of its conditions." But while "suits may be brought on the bond" by several relators, the act, taken literally, allows "any persons" to bring "a suit" on it. The question is, whether the literal reading is the true sense of the act. The defendant's counsel contends, that convenience and legal analogy require the interpretation, that separate actions must be brought on separate rights, and that two persons cannot unite as relators, unless they have a joint interest in all the damages, that can be assessed under the declaration.

There is no doubt, that, in England, any number of breaches may be assigned in an action on an administra-

tion bond. It is payable to the ordinary, who is authorized to take it as a security for the estate. But there is no statute, which provides any particular mode for suing on it, as by an assignee or a person or persons injured; and those matters are regulated by the general law. Therefore the suit is necessarily to be instituted by the assent and in the name of the ordinary, who is a natural person; and but one suit can be brought on it, as it is merged in a judgment on it. Now, the statute 8 and 9 *Wil.* 3, *c.* 11, compels the plaintiff to assign a breach or breaches of the condition, and the jury to assess the damages arising therefrom; and at the same time authorizes him to assign as many breaches as he thinks fit. Although the ordinary really has no interest personally in any breach assigned, yet, by force of the contract with him contained in the bond, he recovers damages arising from a breach of the condition in not paying a sum, for example, to A, in the same manner as if the condition had required the payment of that sum to the bishop himself. As the declaration might assign any number of breaches of the latter kind, that is, in the non-payment of different debts to the ordinary, it follows, that in like manner it may assign several breaches in relation to several duties to another person or to several persons—the bond, in truth, covering all of them. There is no legal reason, why the Bishop should recover for a breach in respect of one of the next of kin more than of another; nor why he may not assign two or more breaches of that kind as well as for matters affecting his private interest. No injury can result to any person from it, and but few inconveniences, if any. The suit is by order of the ordinary, at the suggestion of a person or persons injured; and several will not probably unite in the application, nor the Bishop grant it, if the investigation of one claim will retard the trial as to another. It is true, the case may be much complicated by embracing many breaches in one declaration. But that is attributable to a statute, which is held to be highly

remedial, and to have been made for the benefit of defendants peculiarly. Every defence is open to the defendant on each breach, that would be, if that were the sole breach, or if the action were covenant; for, in answering the declaration, the defendant may put in any number of pleas to each breach—though, indeed, it is otherwise when the breaches are assigned in the replication, as a rejoinder is confined to a single answer. It appears, then, that the suit is in England simply the suit of the obligee, who is the plaintiff of record; and he may of course assign any number of breaches on the condition of this, like any other bond.

But the counsel for the defendants argued that, as our statute, *Rev. St. c.* 81, *s.* 2, requires the relator or relators to state in the declaration matter of inducement, shewing at whose instance and on whose behalf the suit is brought, a relator is not only regarded as a person interested, but as really and legally the plaintiff; and, consequently, that none can sue as relators in the same action, but such as have a joint and equal interest in the whole subject of controversy. The provision referred to is confined to suits on bonds of a sheriff, clerk, and other officers; and there is none such in the act of 1791, which relates to administration bonds, and merely directs that they shall be put in suit at the instance of any person or persons injured, in the name of the chairman of the County Court, to whom they were then made payable. But admit that the form of the declaration is to be the same in both instances, and that it must shew, that particular persons have put the bond in suit, and the interest of those persons in the breaches, the Court cannot agree, as an inference therefrom, that several breaches may not be assigned in respect of persons severally entitled. It is not like the case supposed of several creditors joining in an action on several securities. Here there is a single security for each and all the duties, namely, a bond payable to a trustee for all persons in-

terested; and the recovery ought to be co-extensive with the security and the several rights of the respective persons interested. No reason was ever opposed to it but a technical one, as to a rule of pleading, which prevented the assignment of more than one breach, and was therefore found to impede the administration of speedy and exact justice between the parties, and was abrogated by a statute, which gives a remedy at once more enlarged and more precise, and less expensive. And suits, brought in the name of the State, under a general provision of law, by persons injured, seem to stand on the same footing, as to this point, with those brought by the particular order of the obligee, at the instance of such injured person or persons. We find, indeed, that an action was early brought and maintained on an administration bond for the distributive shares of two next of kin; and we believe that has since been the general practice. *Williams* v. *Hicks*, 1 Murp. 437. There is but one ground upon which it could be held that the law is different in England and here; which is, that there the costs of the trial go according to the result of the several issues, whereas here the party, in whose favor judgment is given, is by statute entitled to "full costs." It might then, happen, if two or more persons have the absolute right of joining sundry demands in the same declaration, in the shape of several breaches of the conditions of a bond, that the defendant might have all the costs to pay, though the issues on the breach, on which the controversy chiefly turned and the costs were incurred, were found for him; which would, certainly, be very mischievous. But the danger, that it might sometimes so happen, is not sufficient to authorize a construction of the act of 1793, not required by its words, but, rather, contrary to them, which would prevent the wholesome reform, enacted in the statute of William, from applying at all to bonds of this character. For that is the point here—whether in any case one action can be maintained for the several

demands of two or more. Instead of holding that these suits are not within the statute, because, in a particular instance, it might produce an inconvenience, it is the rather our duty to devise means for avoiding the particular inconvenience, while the act is left to its salutary general operation. This we think may be readily and properly done, by an exercise of that control over suitors, as to the manner of their using the process of the law, which every Court must occasionally find necessary to guard against its abuse. As, on the one hand, a plaintiff, who has brought several suits for matters which might have been joined in one, has been often compelled to consolidate: so, on the other, if several persons artfully combine to make a defendant liable for all the costs of a suit, because upon a breach in respect of one of them, there must be a verdict against the defendant, though for him upon the other issues, there must be a similar power to prevent the evil by compelling the relators, in substance, to sever. That may be done by the common expedient of staying the proceedings in the joint suit, if it may be so called, at the instance of the defendant, upon equitable terms as to costs, and his accepting separate declarations from each of the relators or so much of them as he might prefer to contend with singly, and pleading to issue thereon. We think, indeed, that the Court clearly has the power to order breaches to be struck from a declaration, where it appears plainly that the right to put the bond in suit has been abused. Suppose, for instance, a relator, for the purpose of saving the costs, were to insert as one of the breaches a failure of the administrator to return an inventory within the ninety days; under the provision that the bond may be put in suit by any person injured, it must be competent for the Court, upon its appearing that the relator had no interest in that provision or had not suffered from the omission for that period, to reform the declaration, so as to confine the relator to matters out of which damages

had been incurred by him. In the same manner, if it appear that it may be to the prejudice of the defendant, in respect to the costs, or his evidence, or other matter, to be obliged to plead to all the breaches in one action, and go to trial on them together, there ought to be a power to modify the proceedings, so as to effect justice in those respects. If both sides choose to litigate all the matters together, as, in this case, they did by an union between the relators in bringing suit, and by the defendants pleading to issue on the merits, there is no reason for the interposition of the Court to prevent them. The relators must submit to any inconvenience that may arise to themselves from having brought one action; but they ought not to have the right conclusively to bind the defendants to go to trial upon all at once. If, therefore, the defendants had, before pleading to the several breaches in this declaration, moved to have the breaches in respect to each relator made the subjects of separate declarations, we should have thought the Court would have acted properly in allowing it. It might be also right in a later stage of the cause to allow it, upon a proper case shewn and upon just terms as to the prior costs. But it was too late to make any motion of the sort when the case was before the jury; and, as an objection to the action itself, it seems to the Court not to be well founded.

The judgment must therefore be reversed, and the issues tried upon a *venire de novo*.

PER CURIAM. Ordered accordingly.

DUNCAN BUIE *vs.* BROWNE & DEROSSETT.

An inspector of lumber &c. in the town of Wilmington, is, by the usage of trade in that town, the agent of both buyer and seller, and, by the same usage, it is the privilege of the purchaser to designate the place of delivery and the duty of the seller to deliver it there. Therefore, where lumber was placed with an inspector for inspection, and he was directed by the purchaser to deliver it on a particular wharf, and, by mistake he delivered it on another wharf, and especially when after such deposit the purchaser informed the seller he would not receive it there, and the property was afterwards casually destroyed by fire, *Held*, that the seller was responsible for the loss, and the purchaser was not bound to pay him the price he had contracted to give.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1846, His Honor Judge DICK presiding.

The action is brought to recover from the defendants the price of a quantity of lumber, sold by the plaintiff, as he alleges, to them, and which was burnt in the town of Wilmington. The plaintiff brought the lumber to the town of Wilmington, where the defendants reside, and offered it for sale to the defendant Derossett, who agreed to purchase it, if, when he saw it, it proved to be good. It is the custom, at that place, as proved by the witnesses, for the purchaser to direct where the lumber shall be delivered, and for the seller to deliver it there. Before delivery, it is required to be inspected, and when the inspector takes possession for that purpose, he is considered the agent of both parties; the inspection is at the expense of the purchaser. The inspector, Mr. Ashe, testified, that Mr. Derosset pointed out to him the place where the lumber was to be deposited, and he did deposit it there. A witness, who was present at the conversation between the inspector and the defendant, stated that Derosset directed the inspector to land the lumber on the wharf of Brown & Derosset, near the stern of a ship then lying there; that the ship was subsequently moved to Stow's wharf, where the lumber was landed,

and where it was burnt. If it had been placed on the wharf of the defendants, it would not have been burnt. After the lumber was landed, and before it was burnt, the defendants told the plaintiff's agent for selling it and with whom the contract was made, that they would not take the lumber, unless it were put on their wharf. The inspector swore that he was employed by the plaintiff to deliver the lumber.

The only controversy arising in the case, as presented to this Court, is as to the delivery. Upon that point, his Honor instructed the jury, "that if the inspector had not landed the lumber at the place pointed out by Derossett, but by mistake, landed it at a different place, yet he was the agent of the defendants from the time he took possession of the lumber by direction of the defendants, for the purpose of landing and inspecting it, and the property vested in the defendants, and the inspector having by mistake landed it at a different place than that pointed out by the defendants, would not alter the case."

Under these instructions, the jury found a verdict for the plaintiff, and from the judgment thereon the defendants appealed.

Warren Winslow, for the plaintiff.
J. H. Bryan, for the defendants.

NASH, J. In the opinion of the Court below, we do not concur. The different inspectors in the State are public officers, appointed by the Courts of pleas and quarter sessions of the several Counties where needed, and, except in the case of the inspectors of Wilmington, hold their offices during good behavior—they giving bond and security for the faithful discharge of their duties, and taking an oath of office; and a penalty is inflicted upon any one for acting as an inspector without being first qualified. For the purpose of inspection, then, the inspector is the officer of the law, and he is the agent

of both parties by the usage of the trade of the town of Wilmington, after he takes possession. By the same custom, it is the privilege or right of the purchaser to designate the place of delivery, and the duty of the seller to deliver it there. This was a part of the contract between the parties. It is a right, highly important to the purchaser. Where, as in this case, he is the owner of a wharf, it saves him much risk, as well as expense, to have it delivered there. If deposited elsewhere, at the election of the vendor, his risk would be increased, not having the control of the premises and not being able to watch and guard it properly and with his own servants. If the lumber in this instance had been landed upon the wharf of the defendants, it would not have been destroyed by the fire. But be this as it may, it was a part of the contract as assumed by the Judge, that the lumber should be landed at the wharf of the defendants. The inspector was an agent, with special authority to deliver and receive at a specified place. The variation here, for the reasons before given, was in a matter of substance and very material. And it was fully known to the plaintiff. The defendants never adopted the act of the inspector, when apprised of the place where the lumber was landed; they informed Pipkin, the special agent of the plaintiff, that they would not take it, unless placed on their wharf. The Judge then erred in instructing the jury, that if the inspector had, by mistake, not landed the lumber at the place directed by the defendants, they were still bound by his delivery. And for this error there must be a new hearing of the cause before another jury.

Per Curiam. Judgment reversed and a *venire de novo* awarded.

DEN ON DEMISE OF STEPHEN W. SAWYER & AL. *vs.* LYDIA SAWYER.

Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer. They died, leaving an only child, who is the *propositus*, to whom the premises were devised in fee by her grand-mother, Tamar. The *propositus* died without issue, leaving, as her nearest relations, a brother and sister of her deceased father, who are the lessors of the plaintiff, and also the said Isaac Sanderlin, under whom the defendant claims

Held by a majority of the Court, RUFFIN, C. J. *dissentiente*, that no part of the land descended to Isaac Sanderlin, but the whole descended to the brother and sister of the father of the *propositus*.

Held by RUFFIN, C. J. that the land descended equally to Isaac Sanderlin, the uncle *ex parte materna*, and to the brother and sister, uncle and aunt, *ex parte paterna*.

Appeal from the Superior Court of Law of Camden County, at the Spring Term, 1844, his Honor Judge BAILEY presiding.

The land, to recover the possession of which this action of ejectment was brought, belonged to Tamar Sanderlin, who devised it to her illegitimate daughter, Zelia Sanderlin, for life, and then to her children in fee. Zelia married Lemuel Sawyer, by whom she had one child, and then died, leaving her husband and child surviving. They are both dead. Besides Zelia, Tamar Sanderlin had one other child, Isaac Sanderlin, who was legitimate and is dead. The lessors of the plaintiff are the brothers and sisters of Lemuel Sawyer, the father, and the defendant is the only child of Isaac Sanderlin. The child of Zelia died without issue.

The only question was, who is the heir at law of the child of Zelia Sanderlin. The presiding Judge decided the plaintiffs were, and the defendant appealed.

This case was argued at a former Term, by

Kinney, for the plaintiffs.

A. Moore, for the defendant.

NASH, J. The child of Zelia Sanderlin was legitimate, and derived the land by devise from her grand-mother. She is therefore in law a purchaser, and the *propositus*. If this was a case at common law, there can be no doubt the plaintiff would be entitled to the inheritance. But descents in this State are regulated. not by the common law, but by our own statutes, *Rev. St. c.* 38. The defendant contends that, under a proper construction of the 4th, 5th and 10th rules, the land in controversy belongs to her, as the heir of the *propositus*. The 4th rule provides "on failure of lineal descendants, and when the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise or settlement, from an ancestor, to whom the person thus advanced would, in the event of such ancestor's death, have been the heir or one of the heirs, &c. the land shall descend to the next collateral relations of the person last seized, who are of the blood of such ancestor. Under this rule, the defendant can take nothing. She cannot avail herself of it, for the reason, that in no event could the child of Zelia Sanderlin have been the heir or one of the heirs of Tamar Sanderlin. The latter had two children, a son Isaac, born in lawful wedlock, and Zelia, who was illegitimate. Upon her death intestate, her real estate would have descended to Isaac, and Zelia the daughter would have taken nothing. *Flintham* v. *Holder*, 1 Dev. Eq. 347. The child Zelia could not have been an heir or one of the heirs of Tamar Sanderlin, and therefore the inheritance cannot descend to her next collateral relations, on the part of her grand-mother.

Nor do we think, that under the 10th rule or canon, the defendant's claim is rendered any better. She comes neither within its letter or reason—certainly not within the former. The rule declares "That when any woman shall die intestate, leaving children commonly called illegitimate, and no children born in lawful wedlock, her real estate shall descend to such illegitimate children and

their representatives, in the same manner as if they had been legitimate. And if any such illegitimate child shall die intestate, without leaving any child or children, his or her real estate shall descend to his or her brothers and sisters, born of the same mother, and their representatives." It is manifest the case before us presents no such state of facts as contemplated in this rule. The *propositus* here was not a mother, nor did she die leaving children, either legitimate or illegitimate. She herself was legitimate, and the inheritance is claimed by no brother or sister of hers, or by any one claiming to represent them, or any of them. Does the defendant come within the purview or reason of the rule, we are considering. The general scope and meaning of the act, we are told in the case of Flintham, was to prevent escheats in cases where before they would take place, and therefore such a construction was to be put upon it as to carry out such intent—meaning such construction to be consistent with the act. In this we agree. Escheats are not favored by our system of laws. If the *propositus* here had died without leaving any one, who could succeed to the inheritance, but collaterals on the part of the mother, the land would have escheated to the University. But in our opinion this case does not present the difficulty. The plaintiffs are the next collateral relations of the *propositus* on the side of her father, and under the 5th rule or canon are entitled to the inheritance. That rule is, "on the failure of lineal descendants and when the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or when, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relations of the person last seized whether of the paternal or maternal line, &c." The words "derived as aforesaid"—refer to the provision in the preceding rule, and we have shown that the child of Zelia could not be one of the heirs of her grand-mother Tamar, and we have also shown that the defendant does not

come within the operation of the 10th rule; neither is she entitled to share in the inheritance with the plaintiff under the 5th rule. We are told by the Court, in the case of *Flintham*, that the common law altogether excluded bastards from the succession—"from an anxious wish to uphold the great social compact, matrimony, our legislature (say the Court) has yielded *something* to natural affection, but not so much as to impair either to the parties or to the public, the value of that important relation." With this view, the provisions in the 10th section were made. So far the legislature has opened the door of succession to illegitimates. Further we do not feel inclined to open it, if we had the power. By so doing, the result might be the entire prostration, in process of time, of the value of the great social compact. Let the bastard child succeed to the mother, where she has no legitimate child, the illegitimate to the illegitimate, for such is the legislature's will, but there we stop. The case has occurred, as provided for in the 5th rule. The next collateral relations, in the paternal line, to the *propositus*, are entitled to the inheritance alone, because those on the maternal line, though equally near, are excluded by the illegitimacy of Zelia, the mother. In the decision of the case of *Flintham*, the Court did not confine themselves to a literal observance of the act, but the case was clearly within its meaning, and to some degree within the words. The decision is confined to the succession of brothers, born of the same mother, and their representatives, and does not extend to other collaterals. That case was correctly decided.

Ruffin, C. J. *dissent.* Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer. The *propositus* died without issue, leaving as her nearest relations, a brother and sister of her deceased father, who are the lessors of the plaintiff, also the said Isaac Sander-

lin, under whom the defendant claims a share of the premises.

The question is, to which of these persons, if either, the premises descended. It seems to me that, being in equal degree, the paternal uncle and aunt and the maternal uncle are co-heirs. It is to be premised that the question depends altogether upon our act of descents. The act not only professes to regulate the descent of inheritances, that is, of all inheritances, but it actually provides for every possible case. The first section covers the case of lineal descents, and the fourth and fifth include every collateral descent, since all estates must be either descended or purchased. The common law canons have therefore nothing to do with the subject, save only to furnish the rule for counting the degrees of kindred, so as to ascertain who is "the next relation," as expressed in the 6th canon. I admit, next, that descents from and to legitimates are alone within the purview of the act, except so far as it may be curtailed by the 10th rule, taken from the act of 1799, and therefore that this question turns upon the construction of that canon and its proper influence upon the construction of the others, as applied to cases that may arise out of the provision of the tenth. Undoubtedly, then, the lessors of the plaintiff, if not the sole heirs, are some of the heirs of the *propositus*, for by the 10th rule the illegitimate child of Zelia, or her issue, could not inherit from Tamar Sanderlin, because she left a legitimate son. Then the land devised by Tamar to the *propositus* was purchased and does not descend exclusively to her next collateral relations on the part of the testatrix under the 4th canon, but descends to her next relations of both lines, if there be such, according to the 5th rule. Therefore, the enquiry here is, whether Isaac Sanderlin, the maternal uncle of the *propositus* is one of her "relations" within the meaning of the act. The 10th rule provides for descents from, to, and through bastards. The first part of it enacts, that the land of a

mother, not having legitimate children, should descend to her "bastard children and their representatives." That is the case of lineal descent, and includes the children and their legitimate issue *ad infinitum*, and thus the natural connexion is made the legal one, in reference to lineal descents to the most remote degree.

The remainder of the canon relates to collateral descents in the case of bastardy. It is thus expressed: "If such illegitimate child shall die intestate without leaving a child, his or her estate shall descend to his or her brothers and sisters, born of the body of the same mother and their representatives, in the same manner as if they had been born in lawful wedlock." It is obvious, upon the face of the act, that it is inartificially drawn and that it does not expressly cover all the cases that may arise out of the new principle it announces, that there may be collateral descents from and to bastard brethren and their issue. That is the principle of the canon; and a due respect to it should oblige the Court so to construe the act, as to sustain the principle, notwithstanding particular cases may, from the imperfection of language, not be distinctly expressed as provided for in it. Thus, it does not expressly provide, how it is to be when there are legitimate and illegitimate brethren. Yet it was held in *Flintham* v. *Holder*, 1 Dev. Eq. 345, as a matter of construction, that the legitimate inherit from the illegitimate. It was so held, because there was no reason for excluding them, after the law had allowed of inheritable blood between a bastard and any child of the same mother; and therefore it was concluded, that the Legislature *could not intend* that the property, real and personal, of a bastard, should fall to the public as derelict, while there was *any* brother or sister of such bastard to succeed to it. To exclude an escheat was a most material consideration in the construction there adopted; for, as was observed in that case, our law leans against them—and that, not merely as a principle of judicial exposition, but as plain-

ly developed in the enactments of the Legislature. Thus there is no exclusion of half-blood; parents inherit from children, widows from husbands, and the nearest relation, who is a citizen, although there be a nearer alien one; and bastard children inherit from mothers and from each other. By that case, then, Isaac Sanderlin would have been the heir of his illegitimate sister Zelia, had she died without issue. Let that be fixed in the mind. Then let it be noticed that the act does not stop there. It not only says, that land shall descend from a bastard to a brother born of the same mother, but it goes on and says if the brother be dead, it shall descend to his issue, the words being, "to his or her brothers and sisters and their representatives." Thus it again makes the natural connexion a legal one; not only in admitting of a descent from a bastard to a natural brother or sister, but also from a bastard to a nephew or neice *ex parte materna*. The act is as clear, that the nephew and niece shall succeed to a bastard, as that the parents of the nephew or niece shall. Does it not follow, from the principle of the act, that, *e converso*, there shall be a descent from the nephew or niece to the uncle or aunt *ex parte materna*. It is to be remembered, that there is no incapacity of half-blood; also, that the incapacity of bastardy is expressly and most materially modified. Not so, indeed, as to abrogate it entirely; but still, so as to admit, as I think, the case before us. That incapacity excludes illegitimate children, when the mother leaves also legitimate; and it also excludes all collaterals, except when the *propositus* and the person claiming stand in the relation of brethren or the issue of brethren. More remote collaterals, I yield, are not admitted, but when they are brethren or their legitimate issue, it appears to me, they are within the plain scope of the act. We have just seen, that from a bastard there may be a descent to a nephew or niece *ex parte materna*. That is within the letter of the act, by force of the words "their represent-

atives." But let us suppose, that those two words had been left out of the 10th rule, and that it had only provided, that is to say, expressly, that there should be a descent from a bastard to his or her brothers and sisters; yet it is clear, that if a brother or sister had died before the bastard, and left issue, such issue would in that case have come in with the surviving brothers and sisters. That would have been so by force of the third rule, which enacts that the lineal descendants of a person deceased, shall represent their ancestor, and stand in the same place as the person himself would have done, had he been living: and then the 10th rule would add that the lands should descend from a bastard, and be divided among his or her brothers and sisters, "in the same manner and under the same regulations and restrictions, as if they had been born in lawful wedlock." I can hardly think any one would contend, that in the case supposed, the Legislature could mean that the child of a deceased brother of a bastard should not come in with the bastard's brothers and sisters, or, in case there were no surviving brother or sister, that such nephew or niece should not come in rather than the land should escheat. It seems to me, that, upon every sound principle of construction, the third rule is to be applied to descents under the 10th rule, in the same manner as it is to those under the other canons. Then we have reached this point, that by the act, land owned by Zelia Sawyer would have descended from her to the child of her brother Isaac, if it had not been intercepted by the *propositus*. And the question remains, whether the brother Isaac or his child is not to succeed to any part of the land of the *propositus*, she being the issue of the same Zelia. It would seem very extraordinary if they are not. They can only be excluded by treating the statute as an act of merely arbitrary legislation in a particular case, and without reference to any principle whatever—at least as it seems to me. In order to test the matter more distinctly, and

see who is the heir of a bastard child, let us suppose such child—who is the *propositus* here—to have inherited land from the mother. To whom does that go? Undoubtedly it would descend to the other children of the bastard mother, or their issue, if any. No one would say, that it should escheat, to the exclusion of the issue of the person from whom it descended to the *propositus*. There then is a descent traced through a bastard, the common mother. But it is said, that as brothers are by the common law in the first degree, the descent between them is immediate, and, therefore, that claiming under the statute, they do not count through the bastard mother. That I admit to be true; but it does not remove the difficulty. The question is to whom it is to go, under a fair interpretation of the act, when there is no surviving issue of the parent from whom the land descended. Now it would seem, in reason and the nature of things, that it ought to go back, and that the Legislature would intend it should go back, to the person or persons who would have inherited it from the mother of the *propositus*, had the latter not been in being. It is upon that rule of reason, and not as a substantive canon of descent, that the principle is founded in the common law, that, as respects descended estates, the line of the parent is the line of the child. It would appear to be an equally sound rule to be applied to the construction of a statute, which, though clear enough as to the principle of it, is defective in its details. *Wilkerson* v. *Bracken*, 3 Ired. 315. I am positively sure in my own mind, that if this land had descended from Mrs. Sawyer to the *propositus*, it would be the sense of the Legislature, that it should return to the collateral maternal relations rather than escheat; not, indeed, to all the collateral relations, but to such of them as would have taken it from the mother herself, namely, her brother and his issue. What reason can be given, why they should not take from the daughter, land descended to her from her mother, when

they would have taken from her mother herself. It is said because the act provides, in its words, for a descent from the bastard mother but does not provide for one from her issue. But the object of the act is to gratify the feelings of nature, arising out of near kindred in blood, by admitting of descents between bastard brethren and their issue, as far as it is consistent with the policy of preferring legitimates to illegitimates, and here both sides are legitimates, and we have seen that the land might have descended from Mrs. Sawyer to her brother Isaac or to *his* child; and that it would have been so by force of the third rule, even if the words "their representatives" had not been inserted in the tenth rule. Then why shall not the land descend from *her* child to the same brother, which land came from her to her child? Nay; we see, that, had Isaac Sanderlin been illegitimate and died without issue, land would have descended from him to the *propositus* or the issue of his sister Tamar: yet, notwithstanding that inheritable blood between them, it is contended that there could not, *vice versa*, be a descent *from her to him*. It is true, she could not have inherited from him in this case, because he was legitimate; but that does not impeach his claim to inherit from her, but rather strengthens it, as the act favors legitimates at the expense of illegitimates. It is said, indeed, by my brethren, that this reasoning is inapplicable to the case before us, because the *propositus* got the land by purchase from her grand-mother, and not by descent from her mother, and because there cannot be an escheat, since there are paternal relations, who can take. But with deference I must say, that it appears to me to be directly applicable; for the subject of enquiry is, the true construction of the statute, and, therefore, it is proper to consider it, not in reference to the narrow point of a particular case merely, but in reference to every case embraced in it. Therefore, it is indispensable to see how it would be, if there were no paternal relations, and if the land had de-

scended to the *propositus* from her mother. If, in that case, the land would escheat rather than go from Zelia Sawyer's child to Zelia Sawyer's brother, as it would have done from Zelia Sawyer herself, then I admit there is an end of the question. But if it is true, as I conceive I have shewn it to be, that, in that case, the law would find an heir for the *propositus*, in the same person who would have been heir to the mother, from whom the land came to the *propositus, rather than it should escheat*, then it follows, the same person must be a co-heir of purchased land with the paternal relations, according to the fifth rule of descents. For, as before observed, the two rules, the 4th and 5th, govern all collateral inheritances—the former making descended estates go to the blood of the first purchaser, while there is any; and the latter making purchased land go to the blood of the *propositus* of both lines, and of the half as well as of the whole blood. Therefore, the case of a descent, from the child of a bastard mother to a maternal uncle, of land descended from the mother, to the exclusion of escheat, is by fair and almost necessary implication, provided for as correlative to the express provision for a descent from a maternal uncle to the legitimate issue of the bastard sister, and as the consequence of the reasonable rule, that land, which comes by descent to one, shall go to the person who would be the heir to him or her from whom it came by descent. But this, being purchased land, goes alike to the legitimate relations on both sides, as I think; and, therefore, in my opinion, the judgment ought to be reversed and judgment given for the plaintiff for two undivided thirds of the premises, and for the defendant as to the other third.

Per Curiam. Judgment affirmed.

THE STATE vs. JAMES S. WHITE.

In an indictment for a libel, the indictment must set forth matter on its face libellous, in which case the Court is to judge whether it be so or not; or it must aver that the matter charged, though not on its face libellous, was intended in fact to be so, and then the question is to be submitted to a jury.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1846, his Honor Judge MANLY presiding.

The defendant was indicted in the following words, viz:—

State of North Carolina, } Superior Court of Law, Spring
Craven County. } Term, 1845.

The jurors for the State, upon their oath, present, that James S. White, late of the County of Craven and State of North Carolina, on the seventh day of December, in the year of our Lord one thousand eight hundred and forty-four, with force and arms, at and in the County aforesaid, maliciously and falsely, intending to defame one Silas S. Stephenson and to bring him into hatred and contempt among the citizens of this State, did then and there a certain false, scandalous and libellous writing, of and against him the said Silas S. Stevenson, falsely and maliciously, frame and write and make and then and there did cause to be published in the form of an advertisement, the substance of which said writing is as follows, to-wit:

NOTICE.—I have discovered in the public paper that Silas S. Stevenson says, that I went to his house for some evil intention, to do him some private injury or his stock. He is a base liar and scoundrel. I went for no other intention, but to search for my stolen property, and his son John was with me all the time. On the 26th of November, at night, I lost some property. The next morning I got item, that it was gone to Silas S. Stephenson's. I immediately pursued and found my property in one of his houses. I made no further plunder but immediately returned home. The villain (meaning the said

Silas S. Stevenson) forgot to say any thing about John Dunn's pocket-book. He forgot to tell the people that he is a murderer and forsworn and is beneath the notice of a gentleman.

JAMES S. WHITE.

December 7th, 1844. 76—77pd

and that the said James S. White, with an intention to scandalize the said Silas S. Stevenson and to bring him into contempt and disgrace, the said false, scandalous, malicious and libellous writing, as aforesaid, framed and written and made, afterwards, to-wit, on the said seventh day of December and on divers other days and times between said day and the taking of this inquisition, in the year aforesaid and in the county aforesaid, to divers good citizens of this State then and there being present, falsely, maliciously, and scandalously, did publish, to the great scandal, infamy and disgrace of the said Silas S. Stevenson and against the peace and dignity of the State."

The defendant offered in evidence the publication contained in a newspaper published in the town of Newbern in which the alleged libel appeared, signed by the prosecutor, and admitted by the State to have been published by the prosecutor, and which is the same referred to in the alleged libel, of which the following is a true copy viz:—

"CAUTION.

"The Subscriber hereby forewarns all persons from trespassing on any part of his land in any way whatever, as he is determined to put the law in force against any person who may be guilty:—and particularly he hereby forwarns James S. White and boys from hunting with guns, or entering, upon any pretence whatever, inside his inclosed land. Said White and boys entered his premises this morning, well armed with guns, no doubt with some evil intention, either to do the Subscriber some private injury or to injure his stock. Therefore he forwarns him and boys, under the severest penalty of the law, from entering any part of his enclosed land. He hopes James S. White and boys will avail themselves of this notice, for if a trespass on his enclosed land should be proved on them or either of them, the law will forthwith be put in force against them.

SILAS S. STEVENSON.

November 24th, 1844.

Upon that part of the libellous publication, beginning "on the 26th of November," and terminating "but imdiately returned home," the defendant introduced his son, who proved that his father had lost some coleworts, and that he traced them to a place occupied by a tenant of Stevenson's, and found some of the greens in the houses; and the defendant's counsel urged that the proof amounted to a justification of that part of the libel.

In charging the jury upon this part of the case, the Court submitted the words in question, and told them to consider them, in connection with *the whole* publication, and, if the meaning conveyed thereby, according to the usual and most obvious interpretation, was, that Stevenson had been concerned in a theft of his goods, the charge would be libellous of itself; and in that case, no *innuendo* was necessary to help the meaning. It is not essential, that a libel shall impute a crime in technical or even in precise terms. It is sufficient, if such imputation be conveyed to the persons to whom the publication is made, by hints and indirect modes of expression, having that meaning in their ordinary acceptation.

The jury found the defendant guilty. The defendant moved for a new trial, on the ground, first, of the admission of improper testimony, and secondly, of error in the charge of the Court; which motion was over-ruled. And then the defendant moved in arrest of judgment, which motion was likewise over-ruled by the Court. And the judgment being pronounced, the defendant appealed.

Attorney General, for the State.

No counsel for the defendant.

Daniel, J. The prosecutor, by an advertisement in a public newspaper, had forewarned all persons trespassing on his land, and particularly the defendant and his sons. The advertisement concluded thus: "Said White and

boys entered his (Stevenson's) premises this morning, well armed with guns, no doubt with some evil intention, either to do the subscriber some private injury, or to injure his stock." The defendant, a few days afterwards, through the same newspaper, answered the advertisement, and denied that he went to the prosecutor's house to do him or his stock any injury. "I went (said the defendant,) for no other intention but to search for my stolen property, and his son John was with me all the time: on the 26th November at night, I lost some property; the next morning I got item that it had gone to Silas S. Stevenson's; I immediately pursued and found my property in one of his houses; I made no further plunder, but immediately returned home." Does this, of itself, and without any averment to that effect in the advertisement, charge the prosecutor with stealing the property? We think it did not. As it stood upon the record, it contained no libellous matter. The indictment simply sets out the tenor of the advertisement, and does not aver that the defendant meant thereby to impute larceny to the prosecutor. Notwithstanding the defective allegation, the Judge left it to the jury to say, whether such an interpretation was to be given to the publication, as charged a larceny to Stevenson; and he told them, if they came to such a conclusion, then that portion of the publication amounted to a libel. We think that, as the indictment is framed, the import of the publication and its sense were to be judged of by the Court; and that it was improper to leave it to the jury to find a meaning, which was not charged upon the defendant in the indictment. If there had been an averment, that the defendant intended, by this portion of the publication, to charge the prosecutor with stealing his property, then the remarks of the Judge upon the evidence offered would have been proper. *Rex* v. *Watson*, 2 T. R. 206. If a Judge and jury, in any case, think that the publication is libellous, still, if on the record it appear not to

be so, no judgment can be rendered. We must understand, from the case sent up to this Court, that the finding of the jury and the judgment rendered in the Superior Court, were confined solely to this part of the publication. That there are, in other parts of it, libellous matter, as set forth in the indictment, is certainly true; but whether this verdict and judgment related also to them, we are left totally ignorant from the case sent up here. Our attention is restrained to one point; and as that is against the State, the judgment must be reversed and a "*venire de novo*" awarded. For what we know, the libellous matter, which is well charged in the indictment, may have been justified by the defendant, or disposed of in some other way. There must be a new trial. If indeed the publication, directly and in express terms, impute to one a crime, the character of the publication, as being libellous, sufficiently appears from the tenor of it, which is set forth in the indictment, and no further averment is requisite. In the one mode or the other, the indictment must shew that the person was held up to hatred, ridicule and contempt. Now, this publication, by its words merely, does not impute larceny to the prosecutor, but rather the contrary; for the purport of it is, that the prosecutor's own son attended the defendant in his search for the stolen goods on his father's premises, and that they were not found in the possession nor under the control of the prosecutor, but "in one of his houses"; which turns out to have been true, as the articles were discovered in a house belonging to the prosecutor, and on his premises, but occupied at the time by a tenant. The defendant's publication, *in this part* of it, was in truth his defence against the charge of the prosecutor, as to the defendant's ill motives for going to his premises, by a statement of his real purpose in going, namely, to find his stolen property, and not to accuse the prosecutor himself with being the thief. As this is the natural import of the defendant's language, and the indictment

contained no averment of any particular and different intent, there was nothing to leave to the jury on this point.

PER CURIAM. Ordered to be certified accordingly.

GEORGE A. MEBANE *vs.* C. G. & P. W. SPENCER, ADM'RS. OF J. H. SPENCER.

A contract was made with two partners for the keeping of certain horses. Afterwards one of the partners died and the surviving partner gave his notes for the amount due on the contract. These notes not being paid and being tendered back to the surviving partner; *Held*, that the original cause of action was not merged, that suit might be brought against the representatives of the deceased partner, to recover damages for the breach of the contract.

Appeal from the Superior Court of Law of Orange County, at the Spring Term, 1846, his Honor Judge DICK presiding.

This was an action on the case in assumpsit. The declaration contains four counts, the first and second upon promissory notes, given by Daniel Murray and the intestate, Isaiah Spencer; and the third and fourth upon contracts therein set forth. The case is as follows: Daniel Murray and Isaiah Spencer were the owners of a line of stages and jointly concerned in running it between Raleigh and Greensboro'. They contracted with the plaintiff to keep eight horses for the year 1841, as set forth in the 3d count, for the sum of $850, and the same number of horses for the year 1842, for the sum of $1,000. The action is brought to recover the amount due upon the notes and also upon the special contracts. On the trial it was admitted by the plaintiff, that, in the year 1842 and after the death of Spencer, the defendant, Daniel Murray, by

agreement with him, removed four of the horses, and that he claimed upon the contract for that year, only for the horses he did keep. It further appeared, that, on the 19th May, 1842, the defendant, Murray, as surviving partner, executed to the plaintiff two promissory notes, one for the sum of $823 83, for the keeping of the horses for the year 1842. These notes were in the possession of the plaintiff and were produced on the trial and were tendered to the defendant. The case states that the notes, stated in the 1st and 2d counts were proved, and the contracts stated in the 3d and 4th counts proved precisely as stated. Upon the closing of the testimony, the defendant submitted to the Court that the plaintiff should be called and non-suited, because of the alleged variance between the contracts as set forth in the 3d and 4th counts, and the contracts, as they contended, which had been established by the notes given on the 19th of May, 1842, and because of the removal of the horses, by agreement between the plaintiff and the defendant, Murray.

The motion of the defendants was overruled, and a verdict and judgment having been rendered for the plaintiff the defendants appealed.

Norwood, for the plaintiff.
H Waddell, for the defendants.

NASH, J. The motion was properly overruled by the Court. The plaintiff was unquestionably entitled to a verdict on his first counts, and from the *statement of the case*, as little doubt can exist as to the two last. The contracts, as set forth, were proved. How then could the plaintiff be non-suited? If it had been proved that the notes of the 19th of May had been paid, or in any other manner their value had been made available to the plaintiff, the Court might have been called on to instruct the jury. that the defendants were entitled to a verdict on the 3d and 4th counts; and it would have been his duty

so to charge. But such was not the fact. They were given by a surviving partner, for debts due by the firm, and were unpaid. The original contracts were not thereby extinguished. But the plaintiff was at liberty to sue upon them, and recover what was justly due him, upon tendering back the notes. 19*th Ves.* 291, *ex parte Hodgkinson.* Nor does the removal of the four horses, as stated, have any other effect than diminishing the amount which the plaintiff was entitled to recover.

PER CURIAM. Judgment of the Court below affirmed.

CARROL BRADY & AL. *vs.* ISAAC BEASON.

Where upon a writ of *recordari* judgment was rendered against the plaintiff in the *recordari*, and the clerk entered the judgment against the sureties only for the costs, and the Court at a subsequent term directed that the judgment should be entered *nunc pro tunc* against the sureties, for the *debt* as well as the *costs*. *Held*, that the Court had the power to do so, if in their discretion they thought it right, and that this Court could not revise such discretionary power.

The case of *Gregory* v *Haughton*, 1 Dev. 442, cited and approved.

Appeal from the Superior Court of Law of Moore County, at the Spring Term 1846, his Honor Judge DICK presiding.

The facts of the case are the following:

Beason obtained a judgment against Brady before a justice of the peace, which the latter removed into the Superior Court by *recordari;* and there the judgment was affirmed. Under the statute, which allows in such a case a summary judgment against them, the Court on the motion of Beason, then ordered judgment to be entered for the debt and costs against the plaintiff in the *recordari*,

and the sureties in the bond given for the prosecution of it; but the judgment was entered by the clerk, as a judgment against the plaintiff for the debt and costs, and against the sureties for the costs only. The mistake having been discovered, Beason moved, at the next term, to have it corrected; and the Court then ordered, that the entry of the preceding term should be corrected and made to read as a judgment against both Brady and the sureties for the debt and costs; and the same was accordingly done. Beason then sued out a *fieri facias*, in which the name of one of the sureties against whom the judgment was rendered, was omitted. At the return of it the sureties moved to set aside, and to vacate the entry of the judgment, upon the ground that the judgment as it now stood against them was void, by reason of its alteration as before stated. The Court set aside the execution for the variance from the judgment, but refused to vacate the judgment, and the sureties appealed.

Winston, for the plaintiffs.
Strange, for the defendant.

Ruffin, C. J. The consideration of this Court is confined to the question of power in the Superior Court; for, if it exist, its exercise is within the discretion of the judge, which this Court cannot control. Perhaps it may be found mischievous, if the judge should lend too ready an ear to such applications, on account of the tendency it might have to encourage inattention, on the part of the counsel and attornies, to settling the proper judgments, according to the right of their claims and to the due entry of them by the clerk, for, as that officer is now chosen, the parties, counsel and the Court, are to expect but little assistance from him in the orderly conducting of the business. But those are points for the judges on the circuits exclusively; for it is impossible, that the proper grounds of decision can be laid before a Court of error, to enable it to revise

amendments or other discretionary orders. As to the question of power, there cannot be a doubt. It is but supplying the default of the clerk in not entering the judgment, as it was rendered by the Court; and without such a power, the Court and suitors would be at the mercy of that officer. It was said at the bar, that what was done was a reversal of the judgment of the preceding term. But it is quite the contrary, as the facts are represented in the case sent here, which of course is to be deemed entirely correct. It is not a reversal of the judgment, but an alteration in the original entry of it, conformably to the truth, and so as to make the record shew the judgment, as in fact the Court gave it. Even if the judgment against the sureties for the debt had been omitted, that is, by the Court, it might, afterwards, have been given and entered *nunc pro tunc*, since no third person can be injured. It is manifestly just between the parties. *Gregory* v. *Haughton*, 4 Dev. 442. But here the Court was not supplying its own omission, but barely protecting itself and the suitor, from the wilful or negligent, and in either case, culpable misprision of the clerk, which is every day's practice. Instead of being a reversal by one Judge of the judgment of his predecessor, it was doing what was absolutely necessary, to prevent the clerk, a mere ministerial officer, from virtually reversing the judgment from the manner of entering it. Such acts or omissions of the clerk must of necessity be under the control of the Court.

PER CURIAM. Judgment affirmed.

THE STATE, TO THE USE OF CHESTER ROCKWELL *vs.* WILLIAM HANKINS & AL.

If, in reply to the plea of the statute of limitations, the plaintiff wishes to avail himself of the pendency of a former suit, he must set forth the suit specially in his replication.

By the practice in this State, if no replication is actually entered, a general one is understood.

When the statute of limitations is pleaded to an action on the bond of a sheriff, clerk, &c. the plaintiff cannot reply that a former suit for the same cause of action had been brought within the proper period, in which there had been a non-suit, discontinuance, &c. In suits of this kind, there is no such saving against the operation of the statute.

The cases of *Kirk* v. *Coble*, 2 Dev. 489, *Slade* v. *The Governor*, 3 Dev. 365, *Worth* v. *Fentress*, 1 Dev. 419, *Brown* v. *Franklin*, 3 Murp. 213, and *Clark* v. *Rutherford*, 3 Murp. 237, cited and approved.

Appeal from the Superior Court of Law of Brunswick County, at the Spring Term, 1846, His Honor Judge DICK presiding.

This was an action of debt brought on the official bond of the defendant Hankins, as the sheriff of Brunswick County, and his sureties. Hankins was duly appointed sheriff, and his official year commenced the 5th of September 1837, and ended the 5th of September 1838. He appointed one Woodsides his deputy, to whom the relator Rockwell delivered, in time for collection, a number of notes and bonds upon solvent debtors. In October 1838, Woodsides received upon these obligations ten dollars, and did not receive upon them any money during the official year of the defendant Hankins. The writ in this case issued the 24th Oct. 1844. The pleas are the general issue—and stat. limitations—and covenants performed. On the trial, the plaintiff offered to prove a demand made on Woodsides in 1842: the Court rejected the evidence. The 25th of Feb. 1843, the plaintiff caused a suit to issue against the defendant for the same cause of action. At December term, the defendant appeared, when the case was put to issue, and at June term 1844, the plaintiff was called and judgment of non-suit enter-

ed against him. His Honor instructed the jury, that the official year of the defendant Hankins ceased on the 5th of Sept. 1838, and the deputation of Woodsides ceased at the same time; and therefore the defendant was not liable on this bond, for the ten dollars received by him in Oct. 1838; and as to the breach for neglect for not collecting, the defendants were protected by the statute of limitations.

Under these instructions, the jury found a verdict for the defendants, and from the judgment thereon the plaintiff appealed.

Badger, for the plaintiff.

Strange, for the defendants.

NASH, J. In the instructions of his Honor, we entirely concur. The office of the sheriff Hankins continued for one year, and ended on the 5th Sept. 1838. *Kirk* and *Coble*, 2 Dev. 489. *Slade and others* v. *the Governor*, 3 Dev. 365. The deputation to Woodsides ceased with the power creating it. The trunk falling, the branches necessarily fall with it. The defendant then was not liable for the ten dollars received by him in Oct. 1838, and the evidence of a demand of it was properly rejected by the Court. Nor are they answerable for the breach of the bond in not collecting. The defendants are protected by the statute of limitations. The act provides that all suits on sheriff's bonds and others, "shall be commenced and prosecuted within six years after the right of action has accrued, and not afterwards." *Rev. St. ch.* 65, *s*, 82. In the present case, the sheriff's official year expired the 5th September, 1838. The plaintiff's cause of action existed at or before that time, and the statutory bar became complete the 5th of September 1844. In order to get rid of this difficulty, the plaintiff relies upon the fact, that he had brought a suit on this same cause of action in 1843, at which time the statute interposed no

bar; and that this suit was instituted within twelve months after the termination of the first at June term, 1844. Under the pleadings in the case, the question does not arise. If the plaintiff intends to rely upon the previous suit in order to avail himself of it, he ought to have replied specially—setting out the former suit, and showing where it was commenced and when it terminated. He has not done so. In practice, when no replication is entered actually, a general one is understood, *Worth* v. *Fentress*, 1 Dev. 419, and so it must be understood here. The evidence of the prior suit was altogether irrelevant. Had the question by proper pleading been brought before the Court, the reason assigned by his Honor would have been an ample reply to the plaintiff's replication. In the 8th section of the act we are considering, and under which the question arises, there is no such saving as is contained in the 4th section—allowing to the plaintiff a year after a judgment arrested or reserved to bring a new action, and which, by an equitable construction, has been extended to non-suit; nor is it *in pari materia* with the actions enumerated in the preceding sections of the act, and to which the 4th section is by its terms limited. This is an action on a penal bond. *Brown* v. *Franklin*, 3 Mur. 213. *Clark qui tam* v. *Rutherford*, 3 Mur. 237.

PER CURIAM. Judgment affirmed.

PLEASANT JORDAN *vs.* JOHN G. WILSON.

The plaintiff was the trustee in a deed of trust made by A. to secure a debt he owed to B. The defendant was also a creditor of A. Under these circumstances, a promise by the plaintiff to forbear proceeding under the deed of trust would not amount to a good consideration at law, to uphold a promise of the defendant to pay to the plaintiff the debt due by A. to B. so as to enable the plaintiff to declare upon it in his own name.

Appeal from the Superior Court of Law of Hertford

County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

The facts are stated by the Judge in delivering the opinion of this Court.

DANIEL, J. This was an antion of assumpsit. Pleas—"*Non assumpsit*," and the "*statute of frauds.*" The case was as follows: One Spiers was indebted to one Wilson, in the sum of $1,000. Spiers conveyed to the plaintiff a lot of land, lying in the town of Murfreesborough in trust, to secure the payment of the debt he owed to Wilson. An execution against Spiers (to the use of the defendant) of a junior date to the deed of trust, was levied on the lot by the sheriff of Hertford. He exposed the land for sale on the 11th day of January, 1843, and the defendant, Wilson, purchased it. The plaintiff alleged in his declaration, that the defendant promised to pay him the balance of the debt due under his deed of trust, if he would not set up his title to the lot, and would not forbid the sale. And he avers that he did not set up his title or forbid the sale, made by the sheriff. In addition, the plaintiff introduced a witness, one Henry Beale, who stated that on or about the 16th day of February, 1843, he heard a conversation between the plaintiff and the defendant, when the defendant said to the plaintiff: "Hold on upon your claim against Spiers and I will pay it." The plaintiff then agreed to do so; the defendant asked him what the amount of the Spiers debt then was: the plaintiff said it was about $60. The defendant on the trial insisted, that the plaintiff had not proved any promise made by him before the day of the sale of the land made by the sheriff, and if he had it was void by force of the 10th s. of *statute of frauds*, (Rev. St. c. 50) which declares that no action shall be brought to charge a defendant upon any special promise to answer the debt, default or miscarriage of another person, unless the agreement or some note or memorandum thereof shall be

in writing" The plaintiff replied to this argument that he gave a new consideration, to-wit, a promise not to set up his title and not to forbid the sale, which new consideration took the past promise of the defendant out of the 10th sec. of the statute. The defendant rejoined in argument and said, that the promise (if any,) which was made by him, was without any new consideration, according to the plaintiff's own admissions, to-wit, that he had made the promise by parol, that he would not set up his title under the deed in trust, and that a parol promise to part with any interest in or concerning land (except leases under three years duration,) is void and of no effect by force of the 8th sec. of the *statute of frauds.* The judge was of opinion, that there was no evidence in the case to prove a promise made by the defendant before the sale of the lot of land by the sheriff. In this opinion we concur. And if there had been a parol promise proven that the defendant should pay the debt due by Spiers, it could not have been enforced for the reasons given by the defendant. The plaintiff then rested his case on the evidence given in by the witness, Beale. And the judge charged the jury, that if they came to the conclusion from his evidence, that a promise had been made by the defendant, to pay the debt of Spiers due to Wilson, in consideration, the plaintiff. Jordan, forbore to sue for the land under the deed in trust, (both parties then believing the deed to be good in law,) and such forbearance had been given by the plaintiff, that was a good consideration in law, for the promise, and the plaintiff was entitled to recover. The jury found for the plaintiff on the evidence of Beale under the charge of the Court. And the defendant appealed. We are of opinion that his Honor was wrong in this part of his charge; because there was no debt due from Spiers to the plaintiff, and his promise to forbear could not amount to a good consideration in law, to uphold a promise of the defendant, to pay a debt to the plaintiff, due by Spiers to Wilson, so as to enable the

plaintiff to declare upon it in his own name. There must be a new trial.

PER CURIAM. New trial awarded.

DEN ON DEM. OF JOHN J. GRANDY *vs.* MORDECAI MORRIS, SEN.

The Act of Assembly of 1823, ch. 74, relating to the sales of land under execution in the County of Pasquotank and other Counties therein named, is a local and private act, and therefore not repealed by the act of 1836, Rev. St. ch. 1, sec. 2, being within the proviso in sec. 8.

By the operation of this act of 1823, sales of land under execution in the Counties therein named are, as to the places of sale, put on the same footing as sales before the act of 1820, which directed them to be at the Court-House; and in those Counties, the sheriff may now sell lands under execution at such places as he in his sound discretion shall judge most expedient.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1846, his Honor Judge BAILEY presiding.

This is ejectment for a tract of land lying in Pasquotank County. Spencer M. Meeds was seized of the premises, and by deed, dated September 2d, 1842, conveyed them to the defendant, who entered into possession. At that time there was a judgment against Meeds, and a *fieri facias* thereon, under which the sheriff of Pasquotank sold and conveyed the premises to the lessor of the plaintiff. Both Meeds and the judgment creditor resided in Pasquotank; and the sheriff's sale was made at the residence of Meeds, from which the premises were two miles distant.

In order to sustain the sale, the plaintiff relied on an act of Assembly, passed in the year 1823, c. 74, entitled "An act to repeal an act passed in the year 1822, en-

titled "An act directing the time and place of selling lands and slaves under execution," so far as relates to certain counties therein named, whereby it is enacted, "that the above recited act be, and the same is, hereby repealed so far as respects the counties of Perquimans, Pasquotank, &c.; provided, that the repeal shall not affect cases where either of the parties in the execution is not a resident of the county so exempted from the act aforesaid: And provided further, that nothing in this act shall be so construed as to revive either of the acts of 1820 or 1821, authorizing the sale of land and slaves at the Court-houses of said counties above named."

For the defendant, it was insisted, that the act of 1823 was repealed by that of 1836, *Rev. St. c.* 1, *s.* 2; and, therefore, that the sheriff's sale was void; because it was not made on the premises. Both of those positions were denied on the part of the plaintiff; and it was thereupon agreed by the parties, that if, in the opinion of the Court, the sale might lawfully have been made as it was in this case, there should be a verdict and judgment for the plaintiff; if otherwise, then the verdict and judgment should be for the defendant. The Court held, that the act of 1823 was not repealed, and that the sale to the lessor of the plaintiff was valid; and according to the agreement of the parties, there was a verdict entered for the plaintiff; and from the judgment thereon, the defendant appealed.

A. Moore, for the plaintiff.

No counsel for the defendant.

Ruffin, C. J. The point is as to the legality of the sheriff's sale, in respect of the place at which it was made. To the clearer understanding of the subject, it seems necessary to advert to the several statutes which provide for the sale of land under execution in the State generally, and also in this particular county of Pasquo-

tank. By the act of 1777, executions were made to run against land as well as goods. But the only regulation it contains, respecting the sale of land, is to require it to be advertised at least forty days; and, in the subsequent act of 1794, it is provided at what hours of the day sales under execution shall commence. Thus stood the law until 1820, when an act passed, c. 32, which directs all sales to be made at the court-house of the respective counties, on the last Thursday of every month. By an act of the succeeding year, 1821, c. 19, it is again enacted, that sales shall be at the court-house; and instead of the last Thursday of the month, that they may be on any Monday in any week. Finally, the general law upon this subject was settled by the act of 1822, c. 25, which alters the time to the same Monday in the month as that on which the County Court is held in the several counties, and again enacts that the court-house shall be the place of sale; and it concludes with a clause repealing all laws within its meaning and purview. If that law governed the present case, of course, the sale under which the plaintiff claims, would be illegal and void. But in the next year the act, 1823, c. 74, passed, which is set out in the case; and the object and effect of it was, as to the counties mentioned in it, to restore the law to the state in which it was before the act of 1822. And, as it is a rule of construction, that a statute, repealed by another, is revived by a repeal of the repealing statute, the act of 1823 goes on further in a proviso, that it shall not be so construed as to revive the two acts of 1821 and 1820, which required the sale of land to be at the court-house. It is thus seen, that the act of 1823 clearly repeals the three acts of the three preceding years, as far as concerns Pasquotank and the other counties mentioned in it. Consequently the sale of land there is now regulated by the acts of '91 and '77, and the common law—unless, indeed, the act of 1823 is not, itself, in force, as contended on the part of the defendant. But upon that point the opinion

of the Court is against the defendant. It is true, that the second section of the *Revised Statutes*, c. 1, repeals all acts passed before the session of 1836, and not there re-enacted. But that is with the several provisos and exceptions contained in the six succeeding sections; among which is the following in s. 8, "that no act of a private or local nature, and no act granting privileges or imposing duties in any particular county inconsistent with the general provisions of law, shall be construed to be thereby repealed." It is very clear, that the act of 1823 is within that saving, as intended by the legislature. It had been printed and published, among the laws passed that year, as a private act; and, besides, it is plainly local in its nature, being confined to particular counties and with provisions, in respect to them, different from the general or public law. Then, as the acts of '94 and '77 say nothing as to the place of sale, this controversy depends upon the enquiry, whether at common law the sale of land under a *fieri facias* must be on the land itself, or be made *bona fide* at any other fit place in the county.

It is certain, as we all know, that before the act of 1820 the constant course was for the sheriff to sell at the places and days, which he judged best suited the convenience and interest of the parties. Sometimes sales were made on the premises. But often they were not. If there were several tracts of land to be sold, and the sale began on one of them, it proceeded there as to all, although the others might be in a different part of the county. Indeed, the most usual place of sale was the court-house and during term time; and, especially, if the land was of much value, because generally that afforded the longest time to the debtor to raise the money without selling his property, and, if the sale became unavoidable, it would be made when there would, probably, be the largest assemblage of bidders. The case of *Lanier* v. *Stone*, 1 Hawks 329, furnishes an instance in 1809 of a sale at the court-house at the return term of the execution; and it was the gen-

eral practice. It was never understood, that a sale of land was within the reasons of the rule, which requires personal chattels to be present. The sheriff acquires no property in the land. He does not seize it, nor deliver the possession to the purchaser; but merely sells the right and leaves the purchaser to recover the possession by action, if not delivered to him by the debtor. Nor can bidders, during the short progress of a sale, judge by inspection of the extent, condition, or value of large landed properties as they can of the several articles of personalty. Until the present case we never heard it supposed, that prior to 1820 the place of sale was not in the sound discretion of the sheriff, as he might judge best for the persons concerned. It was not contended that this sale was not fairly conducted; and therefore we hold it to be effectual, and affirm the judgment.

PER CURIAM. Judgment affirmed.

DEN EX DEM. JOHN HUMPHRIES *vs.* ISAAC BAXTER.

Under the acts of 1820, 1821 and 1822, the sales of land under execution, in the county of Currituck, are excepted from the general provisions of those acts, directing the places where such sales should be made.

One part of a statute may be public in its nature, while another is local and private; and those parts of these acts which concern "particular counties" merely, are to be taken to be of the latter kind, and are therefore saved from the general repealing clause of the act of 1836, ch. 1, sec. 2, by the proviso in the 8th section.

In Currituck county, therefore, lands may be sold under execution by the sheriff, at any place which in his sound discretion he deems most proper.

Appeal from the Superior Court of Law of Currituck County, at the Spring Term 1846, his Honor Judge BAILEY presiding.

Ejectment for a tract of land situate in Currituck county. Both parties claim under sales made by the sheriff on writs of *fieri facias* against Jesse W. Doxey. That at which Baxter purchased, was prior in time and was made on the premises in dispute. Afterwards, the sale under which the plaintiff claims, was made at the court-house, which was also the usual place of holding the petit musters of the militia company to which Doxey belonged. For the plaintiff, the acts of Assembly of 1820, *c.* 32, 1821, *c.* 10, 1822, *c.* 25, were adduced; and it was thereupon insisted, that the sale to Baxter was void, because it was made on the premises, and not at the court-house and the place of petit muster. The Court, however, was of opinion, that the sale to the defendant was lawful and valid; and the plaintiff was therefore non-suited, and appealed.

A. Moore, for the plaintiff.
Heath, for the defendant.

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Ruffin, C. J. This Court concurs in the opinion given by his Honor. We have held at the present term, in the case of *Den on demise of Grandy* v. *Morris*, that, until the act of 1820, the place for the sale of land under execution was in the discretion of the sheriff, whether it was the premises or elsewhere. Therefore the sale to the defendant was good, unless avoided by one of the three acts mentioned. They all enact, as the general law for the State at large, that the court-house shall be the place of sale. But the county of Currituck, doubtless from its situation and form, is excepted in the acts themselves from the operation of the general enactment. The act of 1820 provides, in the third section, that sales in that county shall be held at the usual place of holding the petit musters. It is upon this provision, that the plaintiff insists, that the sale on the premises was unlawful. So it would be if the act of 1820 was still in force.

But the act of 1821, after re-enacting that the court-house shall be the place of sale, and that the day may be any Monday, proceeds in the fourth section to enact, "that the provisions of this act and the provisions of the act of 1820, entitled an act, &c. shall not apply to the counties of Currituck, &c., and that, so far as regards the counties aforesaid, the before-recited act (that is of 1820,) is hereby repealed." The act of 1820 being thus repealed, as to Currituck, and that county being in the act itself exempted from the operation of the act of 1821, the case is at common law, and is governed by the rule already laid down by the Court. But it is said, that the meaning of the act of 1821 was, as far as respects Currituck, to repeal the general enactment as to the court-house being the place of sale, but not the special provision, which made the muster-ground the place of sale in that particular county. That, however, cannot possibly be so. There is an apparent absurdity in the idea, that the enacting part of a statute is repealed, except a single provision, which is in the nature of a proviso to the general enactment. Besides, the third section of the act of 1820 expressly exempts Currituck out of the operation of the previous part of the act, and therefore the act of 1821 could not have been intended further to exempt it. Moreover, the 4th section of the act of 1821 not only says that its provisions and those of 1840, c. 32, shall not apply to Currituck, but goes further and says, "that the before-recited act," that is, the act of 1820, and the whole of it—"is hereby repealed, as far as regards Currituck." It is very clear, therefore, that no place of sale is designated for this county in either of those acts; and the remaining one, that of 1822, c. 25, again, in the fourth section, excepts Currituck and some other counties from its application. It is well settled, that one part of a statute may be public in its nature, while another is local and private, and we think, that those parts of these acts, which concern "particular

counties" merely, are to be taken to be of the latter kind, and are therefore saved by the act of 1836, *Rev. St. c.* 1, *s.* 8.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* IRVINE E. COX.

Where, on the trial of an indictment, the jury find a verdict of guilty generally, and that appears on the record, this Court cannot consider it as a special verdict, subject to the opinion of the Court, notwithstanding the statement of the case by the judge so reports it.

A presentment, made within two years after the commission of a misdemeanor, on which an indictment is founded, is the commencement of a prosecution, within the meaning of our act of assembly and prevents the statute of limitations from attaching.

A presentment need not be signed by all the jury. It should be handed to the Court by the foreman, who is the organ of the grand-jury, to and from whom communications are made with the Court. It should be made in the presence of the jury, but when entered of record, no further evidence is required of its authenticity.

Neither a presentment of a grand-jury nor an indictment requires necessarily that it should be signed by any one.

It is the returning of the bill or indictment, publicly, in open Court and its being there recorded, that make it effectual.

The cases of the *State* v. *Colhoon*, 1 D. & B. 374, and *State* v. *Collins*, 3 Dev. 11, cited and approved.

Appeal from the Superior Court of Law of Moore County, at the Spring Term, 1846, his Honor Judge DICK presiding.

The following facts appear from the report of the case by the presiding Judge and from the record.

This was an indictment against the defendant for an assault and battery on one Kenneth Black. The assault and battery were fully proven, but the affair took place on the 10th of November, 1841, and the indictment was not found until the last week in February, 1844, and the de-

fendant's counsel instituted on his acquittal, upon the ground, that the prosecution had not been commenced within the time prescribed by law. The solicitor then offered in evidence a presentment of the grand-jury made at the fall term, 1843, being the last week in August but one, a paper writing in the words and figures following, to-wit:

"*State of North Carolina,* } Fall Term, 1843.
Moore County. }

The jurors for the State upon their oath present Irvine E. Cox for an assault on one Kenneth Black in November 1841.

Dan'l. McKinnon, Alex. McKenzie, State's evidence."

This paper was signed by none but was entered as follows:

State } Presentment by grand-jury, Wm.
vs. } Shaw, foreman; and the words:
Irvine E. Cox. }

"Wm. Shaw, foreman," were in the proper hand-writing of Wm. Shaw, foreman of the grand-jury at that term. It was in evidence, that upon the paper being presented, the solicitor for the State directed witnesses to be summoned to the next term of the Court, that a bill of indictment might be sent accordingly; all which was done.

The solicitor on the trial insisted, that this paper was a presentment of the grand-jury, authenticated by their foreman, and was a commencement of the prosecution in the terms of the 8th section of the 35th chapter of the *Revised Statutes.*

On the part of the defendant, it was objected, that the said paper was not a presentment of the grand-jury, because not signed by twelve of the body, and, if only the signature of the foreman were required, it was not in fact signed by him, but only endorsed, and, if a presentment, did not prevent the operation of the statute.

The judge left the case to the jury and by consent a special verdict was rendered, subject to the opinion of the Court as follows:

The jury said that the defendant did assault and beat Kenneth Black, as charged in the bill of indictment, on the 10th day of November, 1841: That the paper writing in the words and figures following, to-wit:

State of North Carolina, } Fall Term, 1843.
Moore County. }

The jurors for the State upon their oath present Irvine E. Cox for an assault on Kenneth Black in November, 1841. Dan'l. Nicholson, and Alex. McKenzie, State's evidence.

And endorsed as follows:

State } Presentment by grand-jury.—Wm.
vs. } Shaw, foreman."
Irvine E. Cox. }

Was returned into the Court by the proper officer at fall term, 1843, and that the signature of Wm. Shaw, foreman, is in the proper hand-writing of William Shaw, the foreman of the said grand-jury at that term, that, upon the return of the said paper, the solicitor directed subpœnas to issue for witnesses, returnable to spring term, 1844, that a bill of indictment might be preferred. that accordingly, at spring term, 1844, the bill of indictment was sent and a true bill found by the grand-jury; and, if upon these facts, the Court is of opinion, that the prosecution was commenced in proper time, then the jury found the defendant guilty, and if otherwise, they find him not guilty. Whereupon, the Court having rendered judgment for the defendant, the solicitor appealed on behalf of the State, to the Supreme Court, which appeal is allowed.

The *record* shewed the following verdict: "The following jury sworn, &c. who find the defendant guilty."

Attorney General, for the State.

No counsel in this Court for the defendant.

NASH, J. The defendant was indicted for an assault and battery. The record shows, that he was convicted by the jury. The case sent up by the presiding Judge however states, "the cause was committed to the jury, who, by consent, found a special verdict, subject to the opinion of the Court." What is called a special verdict is then set forth, upon which, judgment was rendered for the defendant. Between the record and the case, in stating the verdict, there is obviously a very essential difference—in the one it is general, in the other special, depending upon the opinion of the Court. We have no doubt the case correctly represents the facts, and that it was the intention of the parties to convert the general verdict of guilty into a special verdict. But unfortunately it was not done. The verdict is still left upon the record, as the jury pronounced it. They have not said that they found a special verdict. We have no power to alter the record, and by it we are informed that the defendant was found guilty. Upon such a verdict the Court had no power to discharge the defendant. It was entirely within the power of his honor to have ordered, if he had thought proper so to do, the general verdict to be set aside, and to award a *venire de novo*, or to have made the verdict on the record conform to the facts of the case. He has done neither—doubtless from inadvertence. The judgment pronounced by him is erroneous and must be reversed.

Our labor so far as this case is concerned might here close. But other points are presented to us, upon which it was obviously the intention of the parties to procure the opinion of this Court, and as they are questions of practice, occurring at every Court and upon which it is believed much misapprehension exists, we think it our duty to examine and decide them.

The offence charged against the defendant was committed in November, 1841, and the indictment, under

which he was tried, was found by the grand-jury at spring 1844 of Moore Superior Court, more than two years thereafter. On behalf of the defendant it was insisted, that he was entitled to his acquittal, because of the length of time, which elapsed between the offence and the finding of the indictment. To meet the objection, the prosecuting officer gave in evidence, as a presentment, made by the grand-jury, at Moore Superior Court at fall term, 1843, a paper in the following words: "State of North Carolina, Moore County, fall term, 1843. The jurors for the State upon their oath present Irvine E. Cox for an assault on Kenneth Black in Nov. 1841. Daniel McKinnon and Alexander McKenzie. State's evidence." This was endorsed "State *vs.* I. E. Cox. Presentment by the grand-jury," and signed on the back "William Shaw, Foreman." It was contended that a presentment is not the commencement of a prosecution; but we are clearly of opinion that it is, and, when made within two years after the offence is committed, is in time. We think so from the nature of a presentment. and from the fact, that the legislature in limiting the period, within which prosecutions for misdemeanors of the character of the one charged against this defendant, shall be commenced, uses the words, "Presentment or indictment." *Rev. St. ch.* 35, *s.* 8. It was further denied, that in this case any legal presentment had been made; and two objections were urged why the paper offered in evidence is not one. The first is, that it is not signed by all the jury; the second, that if that is not necessary, it must be signed by the foreman, while in this case it is not, his name being endorsed. It is true, the paper returned into Court by the grand jury, as containing their presentment, is usually signed by all the jury—but it is merely a practice not required by any law or principle we are acquainted with; nor is any form prescribed in any book of practice. Justice Blackstone, in the 4th vol. of his commentaries, p. 304, says, "a presentment, properly speaking, *is the no-*

tice which a grand jury takes of an offence from their own knowledge or observation." This must be made known to the Court, and lays the foundation, when made, for the indictment. In passing upon the latter, "if the jury are satisfied of the truth of the accusation, they indorse it *Billa vera* or true bill. It is then said to be *found*. So if they are not satisfied, it is endorsed *ignoramus* or not a true bill, and the party is discharged." In both cases the bill is delivered in open Court, but it was never known that the bill was signed by the jury, nor are we apprized it ever was conceived necessary. In all their intercourse with the Court, they act through their foreman. He delivers in the bill, and responds to the questions propounded to them and endorses it, as their presiding officer. The bill, however, being the act of the jury, they ought in every instance to be in Court, when one is returned, and, so in making a presentment. And to ascertain that they are present, they ought always to be called by the clerk. But, as they never sign the bill of indictment, why should it be thought necessary to sign the presentment? The latter is no more the act of the grand jury, than the former, and indeed an indictment is a presentment. The language of the record is "*juratores presentant*," 2 Inst. 123. When either a presentment or indictment is returned into Court, the fact is recorded. In the present case, the record from Moore Superior Court states that, at fall term, 1843, a grand-jury was duly empannelled and sworn and William Shaw appointed foreman. It then states as follows, "and be it further remembered, that, at the said term of our said Court, William Shaw, foreman of the grand-jury, returned into open Court a paper writing in the words and figures following," &c. It then sets out the paper before stated. The error then consisted in considering that paper, as the presentment, when in fact it was but the usual evidence of what the jury had done, from which the clerk drew up his record, showing that the jury had made the presentment.

The second objection is in our opinion equally untenable. It is settled in this State, that an indictment need not be signed by any one. It is good without it, because it is the act of the grand jury, delivered in open Court by them. In the case *the State* v. *Collins*, 3 Dev. 11, the opinion is first suggested by the then Chief Justice HENDERSON, but as the point did not necessarily arise in the case, it was not decided. But in that of *the State* v. *Colhoon*, 1 Dev. & Bat. 374, it was. The custom of endorsing the bill is declared to be no further material, than as it identifies the instrument, expressing the decision of the jury; when made, it becomes no part of the indictment, *Yel.* 99. It is the action of the jury in publicly returning the bill into the Court, as true, and the recording or filing it among the records, that makes it effectual. The same reasoning applies with equal or greater force to the presentment. which, altogether the act of the jury, requires less form in the thing itself, than an indictment. We conclude, then, as signing a bill of indictment is not required to make it legal, so neither is it necessary to a presentment. In neither case is the endorsement set out inenrolment of the record ,when properly made. In this case the record declares, that a presentment was made by the grand-jury, and no evidence was receivable to contradict it; and it was made up, not from the minutes alone of their proceedings, but from that and what the jury declared in open Court.

The cause is remanded for further proceedings according to law.

PER CURIAM. Ordered accordingly.

ENOCH D. FEREBEE vs. JESSE W. DOXEY & AL.

An assignment of a judgment is utterly void at law, and cannot be noticed in a Court of law.

Appeal from the Superior Court of Law of Currituck

County, at the Spring Term, 1846, His Honor Judge BAILEY presiding.

The facts are stated in the opinion delivered in this Court.

Heath, for the plaintiff.

No counsel for the defendants.

DANIEL, J. The plaintiff obtained a judgment for $1000 and interest against Samuel Ferebee, on a bond executed by him and others to his intestate. There was an execution issued on it, which came to the hands of Isaac Baxter, the sheriff. And whilst it was in his hands, the plaintiff assigned the said judgment and execution to him. The judgment became dormant. And this was a *scire facias* to revive it. The defendant pleaded *nul tiel record*, payment and satisfaction. The Judge pronounced, that there was such a record. And from the case sent up here, we do not discover any error in his judgment on this issue. On the trial of the other issues before the jury, the defendant insisted, that the fact of the plaintiff taking an assignment of the judgment from the plaintiff, whilst he held the execution in his hands which issued on it, was in law a satisfaction of the said judgment. The Judge was of a different opinion, and charged the jury to find for the plaintiff, which they did, and he had judgment, from which the defendant appealed. We concur with his Honor. The assignment of the judgment to the sheriff, was a thing void in a Court of law. And we know of no authority which makes such a transaction amount to a satisfaction of the judgment. We have looked to the case of *Reed* v. *Stoats*, 7 John. 427, cited for the defendant, but do not perceive its relevancy. That was an application to set aside an execution, upon which the sheriff had taken a bond from the defendant with a surety, for more than the amount of the debt, and had paid the debt to the

creditor. It was plain, after that the sheriff ought not to levy the debt on the execution, as he was about doing, for the purpose of raising the money for his own benefit. But here the sheriff does not take the law into his own hands, or serve his own process; but this is a *scire facias* to revive the judgment, and the issue is, whether the defendant has paid the debt. Surely he has not. The judgment of the Superior Court must be affirmed.

PER CURIAM. Judgment affirmed.

ENOCH D. FEREBEE *vs.* JESSE W. DOXEY & AL.

If an obligee make his will and appoints any one of his obligors his executor, it is a release or extinguishment of the debt, as to all the obligors: But when the Court appoints one of the obligors to be the administrator of the obligee, it only suspends the debt on the bond during the administration of that administrator, and it does not release nor extinguish it.

No matter, which might have been well-pleaded to the original action, can be heard as a defence to a *scire facias* brought to revive the judgment rendered in that action.

Appeal from the Superior Court of Law of Currituck County, at the Spring Term, 1846, his Honor Judge BAILEY presiding.

The facts of the case are stated in the opinion delivered in this Court.

Heath, for the plaintiff.

No counsel for the defendant.

DANIEL, J. The plaintiff obtained a judgment against Samuel Ferebee for $500, with compound interest from the 7th June 1832, on a bond executed to McPherson, the guardian of , and the plaintiff's in-

testate, by the plaintiff himself, Enoch D. Ferebee, Samuel Ferebee, Isaac Baxter and others. The judgment was confessed by Samuel Ferebee, who was sued alone on the bond. Execution issued, and it came to the hands of the said Isaac Baxter, who was then the sheriff; and the plaintiff, while the execution was in Baxter's hands, assigned the judgment to him. The execution was never levied. The judgment became dormant, and the plaintiff issued this *scire facias* to revive it. The defendant pleaded to the *sci. fa. Nul tiel record, payment and satisfaction.* The Judge pronounced, that there was such a record. And it appears to us, that the *sci. fa.* corresponds with the transcript, sent up here, of the record of the said judgment. We must therefore say, that his Honor's opinion was correct upon this issue. On the trial of the other issues before the jury, the defendant insisted, that as the plaintiff, Enoch D. Ferebee, was a co-obligor with S. Ferebee in the bond on which the judgment had been entered, the debt was therefore in law suspended, as to all the obligors. The Judge refused to charge as the defendant prayed. We concur with his Honor, in his refusal. If Samuel Ferebee, however, when originally sued, had pleaded specially the above facts, his plea would have been sustained. For the law is well settled, that if an obligor make his will and appoints any one of the obligors his executor, it is a release or extinguishment of the debt, as to all the obligors. But when the Court appoints one of the obligors to be the administrator of the obligee, it only suspends the debt on the bond during the administration of that administrator, and it does not release or extinguish it, *Williams on Ex.* 811 *to* 815. But if the defendant had pleaded such a special plea to this *sci. fa.* (which he has not,) it could not have availed him anything, for it is an established principle in pleading, that no matter, which might have been well pleaded to the original action, can thereafter be heard, as a defence to a *sci. fa.* brought to revive the

judgment rendered in that action. Again, the defendant insisted, that the assignment of the judgment to Baxter, whilst he held the execution in his hands as sheriff, and he also being one of the original obligors in the bond, on which the judgment had been rendered against S. Ferebee, was in law a satisfaction of the debt. The Judge held otherwise. And we think his Honor was right on this point of the case. The assignment of the judgment to Baxter, was a mere nullity in a Court of law; and it would not there be noticed. And the fact, that he was then sheriff, and had the execution in his hands for collection, could not operate in law as a satisfaction. We think that the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

HIATT AND JEAN *vs.* J. A GILMER & AL. EX'RS. OF JAMES McNAIRY.

Where a boy was bound by his father as an apprentice to a co-partnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the copartnership was dissolved, the period of apprenticeship being still unexpired, *Held*, by a majority of the Court, RUFFIN, C. J. dissenting, that the persons composing the copartnership could only recover damages for the loss of the boy's services during the time the copartnership continued, and not afterwards.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1846, his Honor Judge SETTLE presiding.

This was an action of assumpsit, brought by the plaintiffs against the defendants, as executors of James McNairy deceased. The plaintiffs proved that they were partners in carrying on the business of harness and saddle-making in the town of Greensborough; that the de-

fendant's testator contracted with the plaintiffs to take, as an apprentice, one of his sons, and to teach him the art and mystery of harness and saddle-making; and that he was to remain with the plaintiffs five years; that, in pursuance of the said agreement, the testator's son went into the employment of the plaintiffs about the month of March 1837, and remained there until the latter part of December 1839, when his father took him home and sent him to school.

The defendants offered evidence to prove that the plaintiffs dissolved partnership, sometime early in the year 1840, the precise time not distinctly established.

The defendants' counsel insisted, that, although the father might have taken away his son before the term of apprenticeship had expired, yet, if the plaintiffs dissolved partnership before the expiration of that term, they could only recover damages up to the period of dissolution. The Court entertained a different opinion, and charged the jury, that, if they should be of opinion that the father made the contract, as proven, with the plaintiffs, and took his son away from the plaintiffs contrary to their wishes and before the partnership was dissolved, they were entitled to recover damages for the loss of the services of the son, for the unexpired time for which he had been bound by his father, although the partnership between the plaintiffs had been dissolved before the end of the term of service. There was a verdict according to these instructions, and from the judgment thereon the defendants appealed.

No counsel in this Court for the plaintiffs.

Morehead, for the defendants.

Daniel, J. This was an action of assumpsit, brought to recover damages, for the breach of the special contract stated in the case. The plaintiffs' declaration avers, that they had taught the boy, and were at all times ready and

willing to teach the said boy according to the terms of the contract; but that the defendants' intestate, in breach of his said contract, had taken his son from the plaintiffs' service, to their damage, &c. The evidence on the trial showed, that the plaintiffs were partners in the business of saddle and harness making. The partnership was by them dissolved, but a very short time after the boy left the shop. And there was no evidence in the case to support the allegation in the declaration, that they were at all times, during the time of the contract, ready and willing to teach the boy in the business of harness and saddle making. The contract had certainly been broken by the defendants' intestate. Then what did the plaintiffs offer to shew in evidence? That they had been injured beyond the loss of the services of the boy up to the dissolution of the firm. The boy was not partnership effects to be divided. The plaintiffs offered *no* evidence, that *they* jointly were in a situation to instruct the boy, after the dissolution of the firm. They failed to prove an essential part of their declaration, to-wit, that they were at all times ready and willing to instruct the boy. This was a condition precedent in the special contract, which, it behooved the plaintiffs to make out satisfactorily to the jury, had been by them performed, or that they had been always ready to perform. Where was the *quid pro quo* for damages ulterior to the dissolution? There was no consideration for such ulterior damages. And the jury would not probably have given them, if the Court had left them uninstructed on this point. There is no rule of law or ethics, that we know of, that could authorize the Court to tell the jury, that the plaintiffs were entitled to recover damages for the loss of the services of the boy, during the time they, the plaintiffs, were unable by their own act to teach and instruct him in the business of saddle and harness making. If the plaintiffs had produced evidence, that they jointly were at all times ready and willing to instruct the boy, notwithstanding the dissolution

of the firm, the verdict might then be right. But no evidence was produced by the plaintiffs, on whom the *onus* lay, to shew, that the condition precedent, mentioned in the contract, had been performed *in extenso*, nor was any readiness by them to perform it shown. We think that there must be a new trial.

Ruffin, C. J. The conduct of the defendants' intestate was a wanton and gross injury to the plaintiffs, who had received his son and faithfully maintained and taught him for two years. After they had incurred that expense and trouble with him, until he had, probably, learnt enough to make his services of use and value, the father took him away, without finding the least fault with the plaintiffs. If any conduct can be inexcusable, it appears to me that such as that is, and that it ought to be left to the jury to give, for such a breach of contract, all the damages the plaintiffs really sustained: if not the full value of the boy's services for the residue of the period of apprenticeship, at all events to reimburse the plaintiffs for their expenditure of money, diet, lodging and apparel upon him, and instruction to him. Surely nothing less than that can be just. But I do not see any reason why the plaintiffs should not recover the value of their apprentice's labor for the unexpired term. It is opposed by the technical reason, that the contract was made with the plaintiffs as partners, and that they cannot recover for the period after they ceased to be partners; and in support of the position, the counsel cited the case of *Weston* v. *Barton*, 4 Taunt. 673. But that case is really the other way. It decides, that a bond, given to a banking-house bearing a particular name, ceases to be obligatory as to transactions with the house after an old partner goes out, or a new partner comes in, though the name of the firm continues the same, and the old assets and responsibilities were to be turned over to the new concern. And the reason, given by Sir James Mansfield, is, that though it

is generally considered that such contracts are made with the firm, as a kind of *political* body, yet in law they are made with the individuals composing the house. That case is an authority for the plaintiffs. The truth is, that the unincorporated partnerships are mere associations of individuals, and their contracts are made jointly by and to the partners, as natural persons; and, hence, if a note be made payable to a firm, it is to be sued on, not in the name of the firm, but precisely as if it were payable to A, B, C, the individuals composing the firm. Therefore, this bargain was made with Joab Hiatt and William F. Jean, the plaintiffs, and not "Hiatt and Jean," as an ideal being. If the latter were the case, the plaintiffs could not recover at all, any more than a corporation, after the expiration of the charter. Such being the law, I am at a loss to discover why the plaintiffs may not recover the whole value of the lad's services. For the contract being with these as natural persons, and to be so stated in pleading, those two men were just as capable of teaching the apprentice the trade of a saddler, and profiting by his labor, after they ceased to be partners, as before. Suppose the one to have carried on a shop, and the other to have attended to instructing the apprentice—they would have complied as literally with their engagement, as if they had continued to be partners. But why should they shew any readiness in that respect? The defendant's intestate had taken away his son and broken the *whole* contract, before they dissolved. After he did so, he had no right to insist on the plaintiffs to renew it, or to execute it specially for the residue of the term. By the waste of his time, the boy's capacity for service might have been impaired; and, at all events, his obedience and submission to discipline were rendered more doubtful. Suppose the father had been sued in *tort* for enticing away the plaintiff's servant: can there be any doubt, that the jury might give all that the plaintiffs could have been profited by the apprentice's services. In *Gunter* v.

Astor, 4 Moore, 12, such an action was brought by a piano forte maker, and it was proved that one of the defendants had invited the plaintiff's workmen to dinner, and induced them to agree to work for the defendant at advanced wages; and, although the workmen of the plaintiff were hired, not for a term, *but by the piece*, yet upon its being proved that the plaintiff's business yielded him, with those men in his employment, £800 a year, the jury gave £1600 damages, under instruction from the Judge to assess what damages the defendant's conduct occasioned the plaintiff. Upon a motion in Bank for a new trial, it was refused; and the Court remarked, that it had been said, the plaintiff only sustained damages for the value of half a day's labor of his workmen, when they visited the defendant's; but it is not for the Court to ascertain the precise damages he is entitled to; and that was most properly left to the jury. So I think, that here it should be left to the jury, to estimate the actual loss the plaintiffs, as natural persons, have sustained, and that, if the jury should give such a sum as would tend to induce men to observe their engagements with good faith, and not to violate them through mere self-will and wantonness, it would subserve the purposes of justice and morals; and the Court ought not to be disposed to disturb it. Wherefore I should think this judgment ought to be affirmed.

Per Curiam. Judgment reversed and a new trial awarded.

ATTORNEY GENERAL *vs.* THE PETERSBURG AND ROANOKE RAIL ROAD COMPANY.

An information, filed by the Attorney General for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts.

When the legislature required "the grounds" to be set forth, on which the forfeiture is alleged to be incurred, nothing less could be meant, than that the information, like an indictment or declaration, should state with certainty to a common intent those facts and circumstances, which constitute the offence in its substance, whether of misfeasance or non-feasance: so that on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged.

When a charter expressly imposes a duty, which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that performance shall work a forfeiture, yet it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the contract.

But if the sovereign, with us the law making power, with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults.

This is an information, filed in this Court, on the 19th of Jannary, 1846, by the Attorney General, charging a forfeiture of the charter of the corporation. The information states, "that by an act of the General Assembly, passed in the year 1830, entitled an act," &c. it is enacted, "that books be opened for the purpose of receiving subscriptions to the amount of $400,000, to constitute a joint capital stock for the purpose of making a rail road from some point, within the corporation of Petersburg, in Virginia, to some convenient point on the north bank of Roanoke river, between the towns of Weldon and Hali-

fax"; and that by the said act, "the said Petersburg Rail Road Company is invested with all the rights and powers necessary for the construction, repair, and maintaining of the said rail road, to be located as aforesaid, and to make and construct all works whatever, which may be necessary and expedient, in order to the proper completion of the said road, and also power to contract with any person or persons for making the said road and performing all other works respecting the same, which they shall judge necessary and proper. and to purchase, with the funds of the said company, and place on the rail road constructed by them under the said act, all machines, wagons, vehicles and teams of any description whatever, which they may deem necessary and proper for the purpose of transportation"; and that, by the said act, it is further enacted, "that it shall be the duty of the President and Directors of the said Company to render to the Legislature of this State annually, a fair account of the expense in constructing and keeping in repair that part of the said rail road, within this State, and the amount of tolls received on the same; and that, whenever the amount of tolls so received shall equal the sum expended in constructing that part of the road, with six per centum per annum on that sum, from the time it was so expended, then it shall be in the power of the Legislature so to regulate the rate of toll, that the nett amount annually collected shall not exceed six per centum per annum on the sum originally expended." The information then states further, "that the said Petersburg Rail Road Company, under the provisions of the said act of the General Assembly, have now for many years had their said rail road completed, and have placed the terminus thereof in North Carolina, at Blakely, on the north bank of the Roanoke river, in the county of Northampton, and, since the completion thereof, have had the said rail road in constant operation; and that, by the provisions of the said act of the General Assembly, the said Petersburg

Rail Road Company ought to have returned, and are bound to return, unto the said General Assembly, annual reports of the tolls, freights and receipts of that part of their said rail road in North Carolina, as well as to make returns of the original cost of the construction of the same, in order to enable the said General Assembly to regulate the tolls on the said rail road; but that the said President and Directors in behalf of the said Petersburg Rail Road Company, have failed to make the said returns."

The information then further states the acts of Assembly of 1832 and 1833, whereby the Portsmouth and Roanoke Rail Road Company was made a body politic and corporate, for the purpose of making a rail road from Portsmouth in the State of Virginia to the south bank of the canal in Weldon in this State; and that the said road was completed in the manner directed by the said acts. And the information then proceeds further: "that by the proper construction of the said act of the General Assembly, passed in the year 1830, the said Petersburg Rail Road Company can only apply the monies raised by the subscription aforesaid, and the moneys arising from the tolls, freights, and other sources for the transportation of produce and passengers, to the making and preserving of the said rail road and repairing the same, and can only contract with other persons for the like purposes, and that all moneys received by the said company, are, and ought to be applied to the said purposes, and. should any remain, the same is, by the said act of the General Assembly, to be paid to the subscribers holding stock in the said Petersburg Rail Road Company." The information then proceeds further: "That that part of the said Portsmouth and Roanoke rail road, which lies in the county of Northampton, including the bridge across the Roanoke river at Weldon, hath heretofore been sold under executions issuing from the counties of Northampton and Halifax, and that Francis E. Rives was the purchaser

under the said executions"; but the Attorney General says that the franchise granted to the said Portsmouth and Roanoke Rail Road Company, does not pass by the said purchase and conveyance from the sheriff of Northampton under the said executions, to the said Francis E. Rives, but remains and is now in the said Portsmouth and Roanoke Rail Road Company; and that the said Petersburg Rail Road Company, on the 14th day of June now last past, entered into the following contract with the said Francis E. Rives, to-wit: "Whereas the said Rives is the proprietor of the Weldon bridge, constructed over the Roanoke river in North Carolina, subject to a mortgage thereupon to secure a debt of $8,000 to the State of North Carolina, and of that portion of the rail road constructed by the Portsmouth and Roanoke Rail Road Company, which extends from the town of Weldon to the Margaretsville depot, in that State, and he has offerred to sell the same to the said Portsmouth and Roanoke Rail Road Company for $50,000; which offer the said Company has rejected: And whereas the said Company obtained from the Legislature of North Carolina the passage of an act to authorize the sale of the whole rail road and other property belonging thereto, unto a new company, which act will go into operation if ratified by the General Assembly of Virginia: And whereas, from the present condition of the said company, it is believed, that its means are not adequate to the purchase of the said Rives' interest, and to the continuing of rail road business, unless the whole road and stock can be sold out to a new company, which must necessarily be effected at a very low price, so that the large pecuniary interest of the State of Virginia in said road must in any event be almost wholly lost. And if such a new company be organized, it will most probably be by non-residents of this State and her interests in the upper rail roads will be greatly impaired in value: And whereas it is of great importance to the stock-

holders in the Petersburg Rail Road Company, of whom the State of Virginia is one to the extent of $323,500, to prevent the competition of any such plan, as is above specified, and the said Rives is willing for a reasonable compensation to prevent his portion of the said road from being used, with his consent, for the purpose aforesaid, the following stipulations have been agreed upon by the parties to these presents: The Petersburg Rail Road Company hereby agree to pay to Francis E. Rives the sum of $60,000 in the following manner, namely, $2,500 on the 1st day of September next, and the same sum every three months thereafter until the sum of $20,000 shall have been paid to him: Then $1,250 every three months after that time until the whole sum of $60,000 shall be fully paid; provided that, during the whole period aforesaid, that part of the Portsmouth and Roanoke Rail Road, which was purchased by him from Weldon to Margaretsville and the Weldon bridge shall remain unused as a rail road for the transportation of persons or produce, and in case the said road or bridge shall be so used for rail road purposes, the payment aforesaid shall cease." The information then sets out the residue of the agreement to the effect, that if there should be any legal proceedings taken for putting the road in operation, the payments should be suspended, until a decision should be given in favor of Rives' rights: that if any other rail road should be constructed to connect the Portsmouth and Roanoke rail road with any point on Roanoke, then the payments should cease altogether: That if Rives should sell the road (excepting the iron on it,) or it should be by any legal means condemned for the purposes of a rail road, that the price or damage allowed to Rives shall be applied to satisfy to Rives, so much of the said price of $60,000, as shall then remain unpaid, and after that shall be done, then to reimburse to the company what it may have advanced, under this contract; and that the surplus, if any, shall be divided equally between Rives

and the company. The information then charges further: "That in pursuance of the said contract and agreement the said Petersburg Rail Road Company has already paid unto the said Francis E. Rives a large amount of the price stipulated to be paid to him by the said contract —the said agreement having been ratified by the stockholders in general meeting, which the said Attorney General says is not only not granted to be done by the said act of the General Assembly passed in the year 1830 incorporating the said Petersburg Rail Road Company, but is directly against the provisions of the said act of incorporation, whereby the said Attorney General says that the charter granted is forfeited, and that the said company ought not further to exercise the privileges granted to them by the said act of the General Assembly, passed in the year 1830."

The defendants pleaded, as to the failure of the President and Directors to make returns to the General Assembly, that by an act of General Assembly of this State, passed in the year 1833, entitled "an act to amend an act, &c., it was, amongst other things, enacted, that the Petersburg Rail Road Company be, and they are hereby authorized to construct a lateral rail road from the point at which their present line of rail road may be crossed by the Portsmouth and Roanoke rail road, or from such point in the neighborhood of the same as they may deem most advisable, to the basin at Weldon, any thing in the act to which this is an amendment, to the contrary notwithstanding," as by the record of the said act remaining amongst the rolls, &c.: And that afterwards, to-wit, at the session of the General Assembly, which commenced on Monday, the 18th day of November 1844, and ended on the 10th of January 1845, a certain other act was passed, entitled "An act to provide, &c." whereby, after enacting, (amongst other things,) "that complaint had been made to the General Assembly that the bridge erected across Roanoke river, below the town of Weldon, by

the Petersburg Rail Road Company, obstructed the passage of masted vessels going to the wharf near the said town of Weldon," it is enacted, "that it shall be the duty of the said Petersburg Rail Road Company to construct a draw of sufficient capacity, at the most suitable point in the said bridge, so as to admit of the easy and convenient passage of such steamboats and masted vessels as navigate Roanoke river below the falls thereof. and to complete the same within nine months from and after the 1st day of January 1845: provided, however, that the said company shall, from the time of ratifying this act, take all produce passing in vessels or boats up or down the river and intended to pass said bridge from the bridge to Weldon, and from Weldon to the bridge, as the case may be, until the draw in said bridge shall be completed, as provided for by the act, in such manner as not to hinder or delay the transportation of such produce, and to take the same free of toll: And that it shall moreover be the duty of the said rail road company, so long as they shall keep the said bridge across Roanoke river, or permit the centre pier of said bridge to stand, to keep a good and sufficient draw in the same, so as not to obstruct the passage of such steamboats and masted vessels as navigate the said river below, and furthermore. to keep a suitable person at the said bridge to open the draw thereof, so as to occasion no delay to the passage of vessels, as aforesaid: And that, if the said Petersburg Rail Road Company shall refuse, neglect or omit to perform the duty required by this act, it shall be the duty of the Attorney General, and he is hereby directed, to institute legal proceedings against the said Petersburg Rail Road Company, by way of indictment or otherwise, to cause the obstruction created by the erection of the said bridge to be removed, as by the record of the said last-mentioned act of the General Assembly remaining among the rolls, &c." whereby all and every forfeiture of these defendants of their corporate

rights, and privileges or franchises, in the said information supposed, by reason of the failure of their president and directors to make the said returns, is waived and remitted: And this the said defendants are ready to verify by the said records. And, as to the making by the defendants of the said contract with the said Francis E. Rives and the payment by them of the said sums of money to the said Francis, in pursuance of the said contract, the defendants plead, that, since the 1st day of January in the year 1841, the moneys necessarily laid out and expended by them, in repairing and keeping in repair the part of the said rail road, lying in this State, between the southern boundary line of the State of Virginia and the said town of Blakely on the said Roanoke river and in defraying the necessary expenses incurred for maintaining transportation on the same, have greatly exceeded in amount all the sums of money, income, and receipts by them had or received by way of toll or otherwise, for transportation of persons or property on the same, and that these defendants, at the time of the said contract with the said Rives, had not nor at any time since had or now have any sum or sums of money received or accrued for the transportation on the said part of the said road, to be divided, as profit, to and amongst the several stock-holders: and these defendants further say, that by another part of the said act of the General Assembly passed in the said information mentioned, these defendants are incorporated into a company by the name and style of the Petersburg Rail Road Company, and it is enacted, that "in that name they may sue and be sued, plead and be impleaded, and shall possess and enjoy all the rights, privileges, and immunities of a corporation or body politic in law, and may make all such bye-laws, rules and regulation, not inconsistent with the constitution and laws of this State or of the United States, as shall be necessary for the well ordering and conducting the affairs of the company:" And these defendants say, that, because the

said contract was manifestly beneficial to them and would enable them to make large profits to be divided amongst the several stock-holders, they, by their president and directors and by the assent of the stock-holders in general meeting, did make the said contract, and did afterwards, out of the profits accrued upon that part of their said road lying in Virginia, pay the said sums of money to the said Rives in pursuance of the said contract, as they lawfully might for the cause aforesaid: all which they are ready to verify, &c.; wherefore, forasmuch as the said defendants at the time of exhibiting of the said information were not, nor at any time since have been, liable to any forfeiture of any of their rights, privileges and franchises within this State, they pray judgment, &c.

The Attorney Generally demurred generally and the defendants joined in demurrer.

The Attorney General, with whom was *Iredell*, for the plaintiff.

Badger, for the defendants.

RUFFIN, C. J. The act of 1831, *Rev. St.* c. 26, authorizes two modes of proceeding at the instance of the public against corporations. The one is by bill of the Attorney General in the Court of Equity, to restrain them by injunction from assuming or exercising any franchise, or transacting any business not allowed by the charter. This part of the act is applicable only when the purpose is not to dissolve the corporation by a judicial decision, but to preserve it, in order that its useful functions may be performed, and, at the same time, that it may not be able to abuse its powers or transcend them. The object of the other mode is to have a forfeiture of the charter or a dissolution of the corporation judicially declared, and a judgment of ouster thereon; and that is to be effected by an information by the Attorney General in a Superior Court of law or in this Court, "setting forth,

briefly and without technical terms, the grounds on which such forfeiture or dissolution is alleged to have been incurred or to have taken place." Of this latter kind is the present proceeding. It is in the nature of a *quo warranto*, and, although the act dispenses with technical formalities, yet it is clear that the information must set out the substance of a good cause of forfeiture, in its essential circumstances of time, place and overt acts. That rule belongs to all pleading, and especially is it proper in reference to a proceeding, in its nature criminatory, to insist upon a forfeiture of valuable franchises, which cost a great outlay of capital. The demurrer by the Attorney General to the defendants' pleas, necessarily opens the way to objections to the information, upon the principle, that, as against the party demurring, we are to go back to the first fault in the pleading; for it is manifest, for example, that here it is immaterial, whether the matter pleaded be a good bar or not, if the charge itself be so radically defective that no judgment of forfeiture can be pronounced on it. In a *quo warranto*, properly speaking, the charge is general, that the defendants, without lawful warrant, use the franchise of being a body politic, and doing certain acts as a corporation. The plea brings forward the charter, as the warrant for acting as a corporation, and states such parts of it and other acts, as authorize the defendants to exercise the corporate franchise specified, up to the time of the writ brought; and then the replication specifies any number of particular overt acts or omissions, on which it is intended to insist the forfeiture has been incurred, and thereto the defendants may either demur or take issue. Under the statute, however, it was intended to simplify the proceedings by having the whole matter of accusation set forth at once in the information, or, at least, some sufficient matter to entitle the State against an admitted corporation to judgment of ouster. These observations have been made, because, as this is the first proceeding under the act, as

far as is known to the Court, it has been deemed proper to give some intimation, that the inartificial and extremely loose statements of this information are not approved by the Court, as sanctioned by the act. For example, it does not charge the subscribing of the stock or the organization of the company under the charter, as a subsisting corporation at any time, but only an authority in the charter for certain subscriptions for making a rail road from &c. to &c. without giving any names, and then says, that "the said Petersburg Rail Road Company" is invested with the rights and powers necessary to make the said rail road *to be located* as aforesaid. Again, while it charges that it was the duty of the president and directors to render to the legislature, annually, a fair account of the expense in constructing and keeping in repair that portion of the road within this State, it does not shew any part of the act, giving power to the stock-holders, or imposing the duty, of appointing a president and directors, nor that any were appointed—a thing indispensable to render the stock-holders amenable in this most penal manner for the omissions of the president and directors. Again, it states that the company have now "for many years had their said road completed, and since the completion thereof" have had it in "constant operation," without fixing any time whatever, as that of the completion or of the operation of the road, or, stating in what the operation consisted, as conveying persons or things for hire and the like; and while it states that "the said Petersburg Rail Road Company" ought to have [not "rendered annually a fair account"] "returned unto the General Assembly annual reports of the tolls, &c. of that part of the road in North Carolina, as well as to make returns of the original cost, &c." it proceeds to charge "that the said president and directors in behalf of the said Petersburg Rail Road Company, have failed to make the said returns" without shewing any time, when it became a duty to render such account or an omission of it at any particular time or place,

and without shewing any sum expended or any profits received or accrued. The other part of the information which respects the transaction with Rives, is equally vague and defective. It states that, by the charter, the company can only apply money, subscribed or received for tolls, to making or repairing the road and the payment of dividends of profit to the stock-holders, and, after setting out the purchase by Rives of a part of the Portsmouth and Roanoke Rail Road, without the franchise of using it as a rail road, it proceeds to state, that on the 14th of June, 184⁵, the company entered into a contract with Rives, which is set out in the information, whereby the company binds themselves to pay Rives certain sums on certain days on certain conditions; and that, "in pursuance of the agreement, the company has already paid to Rives a large amount of the price stipulated to be paid him," without affixing any time or place to either of the facts alleged, except the date of the contract, and without mentioning any sum or sums in particular, as paid to Rives, or averring that the same had either been subscribed by the stock-holders or received for tolls, or how otherwise raised, as by borrowing or in some other manner. When the legislature required "the grounds" to be set forth "on which the forfeiture is alleged to be incurred," nothing less could be meant, than that the information, like an indictment or declaration, should state with certainty to a common intent, those facts and circumstances, which constitute the offence in its substance, whether of misfeasance or nonfeasance: so that, on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inference, on which a forfeiture ought to be adjudged. But the Court does not think it necessary to decide the case upon formal defects in the information of these kinds; because taking it properly to charge the matters, which, as we suppose it was meant to charge, the Court is of opinion, either that it is substantially insufficient, or that the facts alleged by the de-

fendants and admitted by the demurrer sufficiently answer it.

There are two grounds, on which it is alleged, that the forfeiture has been incurred. The one is, that the charter, as set forth, makes it the duty of the president and directors to render to the legislature, annually, a fair account of the expense of making the road in this State and the amount of tolls received on it; and that the president and directors have failed to "make any returns," as it is called. Now, it may be supposed to charge the period when the road was made, the cost of it, the period of using it up to the last session of the assembly, and the annual profit received or accrued, and that the General Assembly had, during that period, divers sessions at such and such days, and that the company omitted to render an account of the cost of the tolls to the assembly, at any one or more of those sessions; and yet, we think, upon the ground taken in the plea in answer to that part of the information, that there cannot be judgment against the defendant. A question might, indeed, have been made, as to an omission—if it be so—to render an account during the year, that elapsed between the rising of the assembly on the 12th of January, 1845, and the filing the information on the 19th of January, 1846, since the charter requires the account to be rendered annually, and it may, perhaps, be still proper to render the account at the period prescribed, although the assembly does not constitutionally have annual sessions, as it had, when the charter was passed. But we do not understand the information as raising that question, and therefore do not consider it, for the information clearly makes the *gravamen* on this part of the case to consist, in not making a return, which would have enabled the General Assembly to regulate the tolls, as provided for in the charter; and therefore has in view only such returns, as ought to have been made before or at the last session of the assembly, which may be supposed to be stated to have been in November

1844, according to the fact. We entertain no doubt, that the omission of an express duty, prescribed by a charter to a corporation, is cause of forfeiture. Its performance is in the nature of a condition, and the sovereign may insist on resuming his grant for the breach of the condition. With respect to the duties arising by implication from the nature of the franchise granted, and the interest of the public in their due and continued performance, we should be inclined to hold, that only such acts or omissions would be destructive of the charter, as concern matters, which are of the essence of the contract, between the State and the corporation; when the corporation fails to do that, which, it must be seen, it was intended and expected it would do, or does that which, it is certain, it was intended and expected it would not do. But when a charter, as here, expressly imposes a duty which the company is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that non-performance shall make a forfeiture, yet, by no latitude of equitable interpretation can it be regarded as a hard bargain, and, as such, relieved against in a Court of law; but it must be taken to have been required by the State, as a material stipulation. for the non-performance of which by the corporation, the State may put an end to the contract. But on the other hand, if the sovereign—with us, the law making power—with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such condnct must be taken, as in other cases of breaches of conditions, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults. It must be so in the nature of things; for, while

the State insists on these stipulations in a charter, as conditions, express or implied, in a contract, the citizen has a right, that they shall be dealt with as other conditions, and that a breach shall not be insisted on, when, after it, the parties acted and dealt as if there had been no breach; for example, when a landlord receives rent after he might have entered for non-payment of it. We do not mean that an omission by the Legislature to take immediate legal steps to enforce a forfeiture, for even a cause most notoriously existing, or that, even in such a case, a statute, recognizing the actual exercise of the corporate functions, would necessarily receive that construction, as, for instance, borrowing money from or keeping account with a bank that had violated its charter. But, in the case before us, the duty imposed on the company is that of making their president and directors render accounts to the General Assembly itself, so that it could not but be certainly known to the Assembly of 1844, that no return had been made to it; and, in that state of things, the Legislature passed an act on the day before the adjournment, which not only recognizes this corporation as then existing, but authorizes and requires it to perform acts, which imply that it is to exist for nine months afterwards, at least; and such acts as impose on the corporation the immediate expenditure of a considerable sum of money and continued outlay for an indefinite period, apparently expected to be co-extensive with the charter. The amended charter allowed the company to extend the road to the canal of Weldon, which is a point on the south side of Roanoke, without expressly directing or authorizing a bridge over the river, though apparently indispensable. After the company had built a bridge, the Legislature requires them to make alterations at their own expense, within nine months, in a work on this new part of their road, and to keep attendants to open the draw, as long as the bridge shall be kept up. Surely it would not comport with the good faith that

should actuate every government, if the State were to turn around immediately after inducing this further expenditure by the company, and getting the work done, and insist upon a forfeiture for a default that had occurred and was absolutely known to the Legislature to have occurred, prior to or contemporarously with the passing of the act. The necessary inference from such provisions in a statute, whether depending on the general principles for the constrnction of statutes, or regarding them as the acts of a party to a contract with conditions, must be, we think, that the Legislature intended the corporation to continue until there should be a further breach; and the executive officers of the State cannot counteract the legislative intention by insisting on the prior default. Happily, we have not had occasion, in this State, to become familiar with defaults of corporations, committed or punished; and we should feel the more hesitation in adopting the conclusion we have, if we did not find it sustained by the authority of decisions by Courts, in which these doctrines have been frequently discussed. In the great case of the Manhattan Company in New York, 9 *Wend.* 361, the judgment was rendered for the defendants principally on this ground.

The other alleged ground is, that the company paid some money to Rives, which they ought to have expended on the road or divided among themselves. There is no allegation that the expenditure on the road would have been necessary or useful. There is no complaint of this transaction, upon the ground that its object was contrary to the interest or policy of North Carolina in any other respect, as, for instance, to prevent the use by the public of the road as a highway, or to obstruct any steps that might legally be taken by the State, or by any under her authority, to appropriate Rives' part of the Portsmonth and Roanoke rail road to public uses. Indeed, it is plain, that the agreement had nothing of the kind in view; but on the contrary, it provides for the contingen-

cy, that the proper authorities, whose action the parties could in no way defeat or bind, should have the road condemned for a rail road. The information then supposes nothing wrong—save only that money, which it assumes, but does not aver, was part of the capital subscribed, or of the profits of the road—was paid to Rives, instead of being kept by the corporation themselves. To this part of the information, after stating by way of inducement, that there were no profits of that part of the road which lies in North Carolina, received or accrued at the time of making the contract with Rives, nor since, to be divided among the stock-holders, the plea in substance is, that the payments to Rives were made with money which accrued as profits on that part of the road which is situate in Virginia. The plea thus raises an interesting question, which may some day prove embarrassing, with respect to charters granted by two States to the same corporation, constituted to conduct a work situate partly in each State—whether or not it be amenable to each State, exclusively, for every thing touching so much of the work as may be in it, and for the application of the profits arising on each part. The plea supposed, that to North Carolina the company is not to account for not constructing the Virginia portion of the road, or not repairing it, or misapplying the profits made on it. This may be true in respect of punishing the officers by indictment for a default in Virginia, or in respect of adjudging a forfeiture of the charter or the franchise in Virginia, which things clearly depend on territorial jurisdiction. But we are not prepared to say, where, by the charters of the two States, the work is executed, as one whole, by subscriptions of stock applicable alike to the parts, in each State, that one of the States could not insist, as the ground of forfeiture of so much of the franchise, as is used within it, that the corporation had not fulfilled its duties in the other State, but violated them to the prejudice of the complaining State. For example, if the char-

ter required that the whole work should be completed by a day limited, and the company made the road in North Carolina, but did not make that in Virginia, would it not be a forfeiture of the part in this State, both because the omission was against the letter of the act, and because it impaired the utility of the part here, by the interruption of the intended line of transportation and travel? Suppose the company were to charge on the road in Virginia double the tolls allowed by law, so as to extort from citizens of North Carolina, passing on the same, excessive fees and prevent others, wishing to use the road, from doing so, would it not form just cause of complaint on the part of this State, and, though not expressly declared in the charter, to be in itself a dissolution, ought it not to be considered a breach of duty, arising out of an implied condition of the charter, for so much of the work as is within our jurisdiction? For, as implied powers of a corporation are as much protected by the law, against the unjust resumption by the State, as those expressly granted, so the duties of a corporation, arising by reasonable implication, are as obligatory on the corporation as those expressly imposed, and their breach visited by the same consequences. It may be, in this case, that the profits arising from the different parts of the road form distinct funds, as the charter requires an account of those in this State only to be rendered, though, no doubt, that is with a particular view to the regulation of the tolls in this State. But we do not find it necessary to decide either that question, or the more general one raised by the pleas, as before mentioned, because, let the statements in the information be taken, as they may, the facts constitute no offence, that we can perceive. The information does not state, out of what funds the payments to Rives were made, except that it may be collected by argument, from the statements of certain parts of the charter, that it was out of the capital or out of the profits of the road in this State, or out of them and the profits of the road in Virginia. Take it in

any one of those cases, and still there cannot be judgment for the State. For such an appropriation of the money of the corporation produces no prejudice to the State or the public, and is against no stipulation of the corporation to the public, express or implied. There is, indeed, a provision in the charter, that the president and directors shall semi-annually declare such dividends of the nett profits from the tolls, as they may deem advisable. This we know from reading the charter, and use for illustration; for that part of the charter is not set forth in the information, but it is only said, that by the proper construction of the act, "the company can only apply their money to certain purposes mentioned, namely, making and repairing the road and dividing the surplus." But it is clear that part of the charter is not inserted for the advantage of the State or to protect the State from detriment, either from an accumulation of capital or a misapplication of profits, but solely for the benefit of the stock-holders. Bank charters sometimes require periodical dividends of the *bonus*, as it is called, besides the stated dividends of profits at shorter intervals. That is to prevent the bank from hoarding its profits, so as in effect to enlarge the capital beyond the sum fixed by the legislature by compounding the profits with it; therefore the public has an interest in the observance of such provision and may insist on it. But the provision in this charter has no such view and is not of that sort, for it leaves the dividends to the discretion of the president and directors, controlled only by their responsibility to the stock-holders, who can turn them out, and are expected to do so, for improperly witholding dividends or misapplying the funds. There is no policy of the State in this case to be subserved by the declarations of dividends, when not demanded or desired by the stock-holders. The provision is exclusively for the benefit of the share-holders; and it would, indeed, be an unheard of measure of penal justice upon the stock-holders, if they were to be deprived of their franchise,

because *their servants*, the president and directors, wrongfully witheld *from them* their money and gave it to some one else. But we may take it, that it was not, in this case, the act of the president and directors, as the contract was approved in a general meeting of the stockholders, and therefore what was done under it may be considered as done by their orders or by them. Suppose it so, then we own, that we see nothing in the charter, nor in any duty, which the stock holders, as a corporation, or as natural persons, owe to the public which makes it criminal in them to dedicate their profits to the use of any person whatever. The profits are theirs, and they have a right to dispose of them to any purpose, to which they might lawfully devote their money, derived from any other source. If what has been done amounts to an assumption of a franchise in that part of the Portsmouth and Roanoke Road, let the proper steps be taken to restrain them from the exercise thereof or to oust them therefrom; but, certainly, the giving Rives their money, whether for a consideration or without it, is no forfeiture by the stock-holders of their own charter—much less when the purpose was to make their road more useful to the public and more profitable to themselves, by drawing travel and freight to it.

The opinion of the Court, therefore is, that there must be judgment on the demurrer for the defendants.

Per Curiam. Judgment accordingly.

ELIZABETH CITY ACADEMY *vs.* DAVID LINDSEY.

When it has been shewn that a charter has been granted to a corporation, those in possession and actually exercising the corporate privileges must be considered as rightfully there, against wrong-doers and all, who have treated or acted with them in their corporate character.

The sovereign alone has a right to complain, for, if there be an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed.

Therefore, where a corporation of trustees of an Academy, consisting of ten, was shewn to have existed, and corporate acts had continually been done in the name of the corporation, although it was shewn by the defendant, in an action against him by the corporation, that one of the original trustees remained alive—*It was held*, that the corporation was not bound, in such an action, to shew a regular succession of trustees down to the time of bringing the suit.

The case of *The Tar River Navigation Company* v. *Niel*, 3 Hawkes 537, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1846, his Honor Judge BAILEY presiding.

This was an action of trover, brought to recover the value of a set of globes, alleged to have been purchased by the defendant Lindsey, as the agent of the trustees for the benefit of the Elizabeth City academy. It was in evidence on the part of the plaintiff, that, in the year 1820, the Legislature of North Carolina passed an act incorporating an academy in the town of Elizabeth City, naming ten persons in the said act as trustees of the said academy; it was further in evidence, that, of the original ten trustees, all of them were either dead or removed from the State, save John C. Ehringhaus, who was examined as a witness, and stated, that he acted as a trustee of said academy from its commencement for about eighteen months after its organization, and that the institution had been kept up from that time till the present, with the exception of a few intervals, when teachers could not be procured. It was further in evidence, from the minutes kept by the board, that the trustees had acted

regularly as such, from the year 1838 to the present time; that they had built an academy, enclosed their lot and repaired the premises, from time to time, and were, at the time of the issuing of this writ, in the enjoyment of their corporate franchises and privileges.

The plaintiffs then introduced several witnesses, for the purpose of showing how the fund was raised for the purchase of these globes, from whose testimony it appeared, that a subscription paper, payable to the trustees of the Elizabeth City academy, and expressed to be for the benefit of the said academy, was circulated or handed to them by the defendant Lindsey; that he collected their subscriptions, stating at the time that the globes would be for the benefit of the academy and would not be removed. The defendant Lindsey further stated, that he was going to New York and would purchase them, he having charge of the said academy as teacher the previous session, and that being vacation. It was further in evidence, that the defendant Lindsey went to New York, purchased the globes, returned, and again took charge of the academy; that he subsequently took charge of another school, and was then teaching school at the bringing of the action, and that the globes were demanded of him by Timothy Hunter, one of the trustees, previous to the bringing of this action, when he refused to give them up, alleging they were purchased for him. As to the other defendant, Fearing, they were demanded of him also, and he answered that he wished he had never seen the globes.

The defendants objected, that the plaintiff could not recover: first, because a continuance of the corporation had not been shewn, and upon this point insisted, that it must appear that the places of those corporators, who had died or removed, had been regularly filled or supplied according to the provisions of the charter; that it was not sufficient to shew that persons were calling themselves trustees and acting as such, but that the plaintiffs

must shew a regular and unbroken succession, from the commencement, according to the provisions of the charter.

Secondly, it was objected that the plaintiffs could not recover, because the globes were bought for the benefit of Lindsey, the defendant, to remain in his possession as a teacher, while he remained in the place, and not for the use of the Academy; and for this purpose, several witnesses were introduced, who swore in substance, that they subscribed for the purchase of the globes for the benefit of Lindsey's school, and that they desired, when he left the academy, and still desired, that he should retain them. Furthermore, the defendant offered in evidence a paper writing, signed by sundry individuals, stating that they were subscribers and desired that Lindsey should have the globes. This evidence was objected to by the plaintiff's counsel, and rejected by the Court.

The Court instructed the jury, that if they were satisfied that there were persons acting as trustees of the Elizabeth City academy, and exercising corporate franchises under the act of incorporation, at the time the suit was brought, the only enquiry would be, for whom the globes were bought, for the trustees or for the defendant Lindsey. If they were purchased by Lindsey, as the agent of the trustees, and were used by him as their agent, then his possession was lawful until a demand was made, but if, upon demand made, he refused to give them up, and carried them away and used them as his, it was a conversion, and the plaintiffs would be entitled to recover their value. But if the globes were purchased by Lindsey for himself, then they should find a verdict for him, and as to the other defendant, the evidence was submitted to them, whether he had any control over them, or possession of them, at the time of the demand or before; if not, they should find in his favor. Whereupon, the jury found a verdict in favor of the plaintiffs against David Lindsey, and in favor of Oliver Fearing.

Rule for a new trial. Rule discharged, and judgment for the plaintiff. Appeal prayed to the Supreme Court, and granted upon bond and security given.

A. Moore, for the plaintiff.
J. H. Bryan, for the defendant.

DANIEL, J. The plaintiffs were by charter, an aggregate corporation of ten trustees. It was incorporated in the year 1820 by the legislature: and immediately thereafter, it was organized and acted, as a corporation. The defendant proved, that all but one of the original ten corporators had either died or removed away, and he insisted that the plaintiffs could not recover, because a continuance of the corporation had not been shown. He insisted, that the places of the original nine trustees, who had since died or moved away, should be by the plaintiffs, proved to have been regularly filled up according to the provisions of the charter. And that it was not sufficient to show, that persons, calling themselves trustees, acted as such; but that the plaintiffs ought to shew, upon the trial, a regular and unbroken succession of trustees, from the year 1820, according to the provisions of the charter. The Court instructed the jury upon this point of the defence, that if they were satisfied that there were persons acting as trustees of the academy, and exercising corporate franchises under the act of incorporation, at the time the writ was brought, then their only enquiry would be for whom the globes were bought—for the trustees or the defendant. We think, that this part of the charge of his Honor was correct. In the case of the *Tar River Navigation Company* v. *Niel*, 3 Hawks 537, the Court said, that, when it is shewn that a charter has been granted, then those in possession, and actually exercising the corporate rights, shall be considered as rightfully there, against wrong doers and all those who have treated or acted with them in their corporate character. The sove-

reign alone has a right to complain, for, if it is an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. The defendant then insisted, that the globes were purchased for him as a teacher, and not for the academy; and he examined several witnesses on this point of his defence; and, in aid of their testimony, he offered in evidence a paper writing, signed by several individuals, stating, that they were subscribers for the purchase of the globes, and that they now desired that the defendant should have them. This evidence was rejected by the Court. And we think it ought to have been rejected, for the bare wishes of the subscribers upon the subject, at the present time, could neither give or take away the title to the property. The paper writing was therefore immaterial and irrelevant to the issue then under consideration. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

BENJAMIN WHITLEY *vs.* JAMES A. DANIELS.

On a suit for the penalty for trading with a slave, when it was proved the defendant offered to shew the plaintiff his "barter book" in order to convince him that he had paid nothing to the negro, who had delivered the articles to his agent, it was not competent for the plaintiff, on the trial, to prove by the witness, before whom this declaration was made, in order to shew the *time* when the transaction took place, "what was the time of trading, *as appeared on the book.*" Notice to produce the book should have been proved, before such evidence was admissible.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1846, his Honor Judge BATTLE presiding.

The facts are stated in the opinion delivered in this Court.

Whitaker, for the plaintiff.

No counsel for the defendant.

NASH, J. The defendant was warranted, to recover the amount of a penalty alleged to have been incurred by him, in illegally trading with a slave by the name of Ganze, the property of the plaintiff. In order to prove the charge, the declarations of the defendant were relied on. The defendant admitted that his agent, at his landing, had received such articles from Ganze as were claimed by the plaintiff, and that *he* had received them, but did not know there was no permission in writing; that they had been entered on his barter book, but were not paid for, as the plaintiff could see by inspecting the book, which he tendered to him for that purpose, as also the time when they were received. In order to show when the transaction took place, the witness who proved these declarations was asked, "what was the time of trading, as *appearing on the book*." The question was objected to, because of the want of notice to produce the book. The objection was overruled, and the testimony received, and upon it, it appeared the warrant was brought within due time. No more of the case is here stated, than is necessary to exhibit the point upon which our opinion is founded.

The 75th sec. of the 34th ch. of the Revised Statutes, forbids the trading with slaves for the articles therein enumerated, without a written permission from the owner or manager of the slave, specifying the articles which he is permitted to sell, under a penalty of one hundred dollars for each offence. By the 77th sec. the offence is made indictable, and by the 80th sec. it is "provided that no suit or indictment shall be prosecuted for any violation of the 75th sec. unless such suit or indictment be commenced within twelve months after such violation." The defendant had pleaded, that the suit had not been commenced within the time limited by the act, and it

was important to the plaintiff to show that it was brought within due time. The evidence offered to prove the fact was not competent, and his Honor erred in receiving it. Every thing said by the defendant at any time, concerning the transaction, was legal evidence against him, and the plaintiff was entitled to the benefit of it. But the objection now is, that the evidence was not to prove any declaration of his whatever, but of a separate and distinct fact—*the contents of the barter book.* The witness was not asked what the defendant had *said* was the time of committing the offence, but what the barter book stated was the time. In all the cases to which our attention has been drawn, the testimony was as to the declarations and acts of the defendants accompanying them. In that of the *King* v. *Moores and others*, the indictment was for *administering seditious oaths.* Witnesses swore to some words, in nature of an oath, *spoken* by the prisoner, who held a paper in his hands whilst he uttered them, and it was insisted no parol evidence could be received *of what he said*, because notice had not been given to produce the paper from which it was supposed he had read them. The objection was over-ruled by the Court. *Hunt's case*, in 5th Eng. C. L. R. 377, is to the same effect. The defendant, with others, was indicted for a conspiracy to disturb the peace. A meeting was held at Smithfield, where Hunt appeared on the hustings, and delivered to the witness a paper, containing, as *he stated*, a copy of the resolutions to be proposed to the meeting, and the witness swore, that the resolutions he heard read corresponded with the copy so delivered to him. It was objected the paper was but a copy of the resolutions, and therefore not the best evidence without notice to produce the original. Justice Bailey, before whom the case was tried, admitted the evidence, and, upon taking the opinion of the other Judges, his decision was approved, upon the ground that the paper produced was received from the hands of Hunt, as con-

taining the resolutions then under discussion in the meeting, and, as to him, it was as good, if not better evidence, than any other could have been. In *Moore's* case it was not necessary to produce the paper he held in his hand, because he *administered* the oath in the hearing of the witness. It was, therefore, that his declaration, or what he said, was given in evidence against him, and if the paper held by him had been produced and had proved to be a blank, still what he did and said in administering the oath would have been evidence against him, and in *Hunt's* case, it was the same as if he had repeated to the witness the resolutions, or the witness had heard him propose them to the meeting, for he told him it contained the resolutions to be proposed, or then actually under discussion. In truth, as Chief Justice ABBOT remarked, the paper handed the witness was as good, if not better evidence, than any other. In both cases it was what the defendants said, that was given in evidence. The principle of those cases does not apply to the one we are considering. The defendant, Daniels, said, the articles had not been paid for, and tendered the barter book as proving that fact. He did not say when the trading took place, but that the book would show it, nor was the witness called on to prove any declarations of his as to that fact. He was asked, not what the defendant had said as to the time, but what the book stated. It was in no view a part of the *res gesta*. The case of *La Motte*, 1 East. C. L. 126, was decided upon a different principle than those we have been considering, but still upon one which does not help the plaintiff's case. He was indicted for carrying on a traitorous correspondence with France, while war existed between her and England. Letters of the prisoner, written to the French government were intercepted, copied and sent on to their destination. The reception of these copies in evidence was opposed, upon the ground that the originals ought to be produced, as being the best evidence. The objection was overruled. The originals were not in

the possession or under the control of the prisoner, and the doctrine of notice did not apply, neither were they within the jurisdiction of the Court. No process, that could issue, could produce them. The copies then were the best evidence the nature of the case admitted. Here the barter-book was in the possession of the defendant. The plaintiff might have compelled its production, or by giving due notice, entitled himself to give parol evidence of its contents. He has not therefore given the best evidence the nature of his case admitted. For this error on the part of the presiding Judge, the judgment must be reversed and a *venire de novo* is awarded.

PER CURIAM. Judgment reversed and *venire de novo*.

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ACCESSARY.
See EVIDENCE—INDICTMENT.

ACCORD AND SATISFACTION.
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AGENT & PRINCIPAL.
1. When an agent is appointed to sell articles of personal property, the law implies that he has a right to warrant their soundness, in behalf of his principal. *Hunter* v. *Jameson*, 252
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AGREEMENTS.
See CONTRACTS.

APPRENTICES.
Where a boy was bound by his father as an apprentice to a co-partnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the co-partnership was dissolved, the period of apprenticeship being still unexpired, *Held*, by a majority of the Court, RUFFIN, C. J. dissenting, that the persons composing the co-partnership could only recover damages for the loss of the boy's services during the time the co-partnership continued, & not afterwards. *Hiatt* v. *Gilmer*, 450

ASSIGNMENT.
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ATTACHMENT.
1. In a proceeding by at-

tachment, when an interplea has been filed, the only issue submitted to the jury is as to the title to the property levied on. The jury have no right to assess the value of the property or damages for its detention or destruction. *McLean* v. *Douglass*, 233

2. After property is levied on under an attachment, it is, until replevied, in the hands of the officer, in custody of the law. When the issue as to the title is found in favor of the plaintiff in the interplea, the Court on motion will make an order on the officer for its delivery, a disobedience of which on his part would be punishable as a contempt. *Ibid.*

3. If the officer has voluntarily parted with the property, or, by his negligence, suffered it to be destroyed or injured, he is answerable in damages to the owner. *Ibid.*

4. Under our attachment law, a non-resident creditor may attach the property of a debtor residing in this State, who has absconded or so conceals himself that the ordinary process of law cannot be served on him. *McCready* v. *Kline*, 245

BAIL.

A sheriff was bail for A. and B., against whom there was a joint action. A *ca. sa.* issued upon the judgment against them. B. was not to be found, but the *ca. sa.* was executed on A. and then the sheriff voluntarily permitted him to escape, but afterwards re-took him.—*Held*, that this re-caption was unlawful, and that the assent of the plaintiff, after such recaption, that A. should not be held in custody, did not operate as a satisfaction of the judgment, nor did it deprive the plaintiff of his remedy against the sheriff as the bail of B. *Jackson* v. *Hampton*, 34

BAILMENT.

Where a person had agreed to purchase a horse, which was delivered to him and was to be his when he paid the full price, and he died before he completed the payment, this was a bailment coupled with an interest, which, on his death, vested in his personal representative. *Grant* v. *Williams*, 341

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Taking negotiable paper in payment of a precedent debt, constitutes a purchase of it for value; and the *bona fide* endorsee will hold it, unaffected by any equities, if he take it

without notice of any facts, which implicate its validity, as between the prior parties. *Reddick* v. *Jones*, 107

2. Where a note was executed in this State, not payable at any particular place, and was afterwards endorsed in the State of Virginia—*Held*, that whatever might be the law in Virginia, the endorsee could maintain his action in this State, against both the drawer and endorser. *Ibid.*

BONDS.

1. In the construction of bonds, if the bond be a single one, it is to be taken most strongly against the obligor; but when a condition is annexed to it, which is doubtful, as that is for the ease and favor of the obligor, it is to be taken most strongly in his favor. *Bennehan* v. *Webb*, 57

2. In the construction of conditions, the Court will look to the meaning of the parties, so far as it can be collected from the instrument itself, and, when the intention is manifest, will transpose or reject insensible words, and supply an accidental omission, in order to give effect to the intention of the parties. *Ibid.*

3. When the condition of a bond is preceded by the recital of a particular fact, the recital will operate against the parties to the bond, as a conclusive admission of the fact recited; and this recital will frequently operate as a restraint of the condition, though the words of it imply a larger liability than the recital contemplates. *Ibid.*

See OFFICIAL BONDS.

CLERKS OF THE COUNTY COURTS.

1. The County Court is constituted the tribunal to determine contested elections of Clerk, and neither an appeal nor a *certiorari* can be supported to revise their decision. *Daughtry, ex parte*, 155

2. Nor is the party against whom the decision has been made, entitled to a *mandamus*, unless he swears, that if the County Court had made the proper enquiry as to the validity of the votes given to the respective candidates, or, if it should be made now, there is good reason to believe, that the person complaining, and not the other candidate, was duly elected. *Ibid.*

3. If a person thinks himself elected Clerk of a County Court, instead of the one pronounced by the said Court to have been duly elected, his remedy, if he

has any, is by a writ of *Quo Warranto*. *Ibid.*

4. Where an election for Clerk of the County Court is contested, the party contesting should be confined to those objections, of which he has given the legal notice to the opposite party. *Ibid.*

CONSTABLES.

A Constable has no official authority to collect money, except upon execution; and he and his sureties are only liable on his official bond, under the Act of 1818, (Rev. Stat. ch. 24, sec. 7,) giving a remedy to the creditor on that bond for notes, accounts, &c. put into his hands for collection, when it is proved that the Constable was the creditor's agent for collecting the money due on the claims. *Williams* v. *Williamson*, 281

CONTRACTS.

1. In construing an agreement, there are no technical rules to determine, whether its stipulations are dependent or independent, but every agreement is to be judged of according to its own terms and the nature of the transaction to which it relates, so as best to effectuate the intention of the parties. *Dwiggins* v. *Shaw*, 66

2. The order in which the provisions are found in the instrument, does not control the construction, but they will be transposed so as to effectuate the intention, which is to be collected from the order in point of time, in which the several acts of the different parties are to be performed. *Ibid.*

3. The construction of a written document is purely a matter of law, in all cases, where the meaning and intention of the parties are to be collected from the instrument itself. *Sizemore* v. *Morrow*. 54

4. Where A. sold a tract of land to B—made him a conveyance and took his bond for the purchase money, and afterwards B. reconveyed to A. who entered into bond that he would convey to B., whenever the purchase money should be paid; and it was further stipulated that if the purchase money were not paid, B. should pay a certain rent—*Held* that this latter contract rescinded the first, and that the bond given under the first contract was discharged at law. *Ibid.*

5. A contract was made with two partners for the keeping of certain horses. Afterwards one of the partners died and the surviving partner gave his notes for the amount due on the contract. These notes not being paid and being ten-

dered back to the surviving partner; *Held*, that the original cause of action was not merged, and that suit might be brought against the representatives of the deceased partner, to recover damages for the breach of the contract. *Mebane* v. *Spencer*. 423

6. The plaintiff was the trustee in a deed of trust made by A. to secure a debt he owed to B. The defendant was also a creditor of A. Under these circumstances a promise by the plaintiff to forbear proceeding under the deed of trust would not amount to a good consideration in law, to uphold a promise of the defendant to pay to the plaintiff the debt due by A. to B. so as to enable the plaintiff to declare upon it in his own name.—*Jordan* v. *Wilson*, 430

CORPORATIONS.

1. An information, filed by the Attorney General for the purpose of having the charter of an incorporation declared to be forfeited, though it need not be expressed in technical language, yet it must set out the substance of a good cause of forfeiture in its essential circumstances of time, place and overt acts. *Attorney General* v. *Petersburg and Roanoke R. R. Co.* 456

2. When the Legislature required "the grounds" to be set forth, on which the forfeiture is alleged to be incurred, nothing less could be meant, than that the information, like an indictment or declaration, should state with certainty, to a common intent, those facts and circumstances, which constitute the offence in its substance, whether of misfeasance or non-feasance: so that on its face, if true, it may be seen that there is a specific ground in fact, and not by conjectural inferences, on which a forfeiture ought to be adjudged. *Ibid.*

3. When a charter expressly imposes a duty, which the corporation is to perform, not merely to the citizen, but towards the sovereign itself, although it may not declare that nonperformance shall work a forfeiture, yet it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the contract. *Ibid.*

4. But if the sovereign, with us the law making power, with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own

archives that the contrary cannot be, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of the previous defaults. *Ibid.*

5. When it has been shewn that a charter has been granted to a corporation, those in possession and actually exercising the corporate privileges must be considered as rightfully there, against wrong-doers and all, who have treated or acted with them in their corporate character. *Eliz. City Academy* v. *Lindsay*, 476

6. The sovereign alone has a right to complain, for, if there be an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed. *Ibid.*

7. Therefore, where a corporation of trustees of an Academy, consisting of ten, was shewn to have existed, and corporate acts had continually been done in the name of the corporation, although it was shewn by the defendant, in an action against him by the corporation, that one of the original trustees remained alive—*It was held*, that the corporation was not bound, in such an action, to shew a regular succession of trustees down to the time of bringing the suit. *Ibid.*

COUNTY TRUSTEE.

See SHERIFF.

COVENANT.

1. A covenant by one for himself and his heirs to stand seized to an use *in futuro*, as for instance, on his death, is good in law. *Davenport* v. *Wynne*, 128

2. A., by deed poll, in consideration of love and affection, conveyed to his son B. and grand-son C. certain lands, with the usual *habendum* and *tenendum* clauses, and then follow these words—"and furthermore, they, the said B. and C., their heirs and assigns, are not to interrupt the said A. during his life-time on the said premises, by them terms I have hereunto set my hand and seal, &c." *Held*, that this was a covenant by A. for himself and his heirs to stand seized to the use of B. and C. and their heirs on his death, and that therefore the statute of limitations

could not commence running against B. and C. and their heirs until the happening of that event. *Ibid.*

3. The omission of the word "penal," in stating the damages which either party might recover for the breach of a covenant, as for instance, a covenant for conveying title, does not necessarily make the sum mentioned, liquidated damages. *Lindsay* v. *Anesley*, 186
4. Whether the sum mentioned, be merely a penalty or liquidated damages, must depend upon the circumstances and nature of each case. *Ibid.*
5. The *quantum* of damages, in an action of covenant, may be assessed by the jury, when the precise sum is not the essence or substance of the agreement. *Ibid.*

DEED.

1. A deed conveying "the Store-house wherein A. B. had a store, now occupied by him as a post-office, with the out-house and office adjoining," conveyed also the lot on which the houses were, there being nothing in any other part of the deed to control the description and exclude the lot. *Wise* v. *Wheeler*, 196
2. A., by deed dated in the year 1790, in consideration of natural love and affection, &c. conveyed certain lands to his son B. "to have and to hold, &c. unto the said B. his natural life only, and then to return to the male child or children of the said B., lawfully begotten of his body—for the want of such, to return to the male children of my other sons, C. and D., to their proper use, benefit of him, them and every one of them equally, and to their heirs and assigns forever; and the said A. for himself, &c., doth covenant and grant to and with the said B. his lawfully begotten male heirs, and, for want of such as aforesaid, with my other two sons, C. and D. and each and every of their male heirs, &c. that he, the said B. and his heirs as above mentioned, if any, or otherwise his two brothers above-named, during their natural lives or life, and after them unto their male heirs, &c. shall and may lawfully, peaceably have, hold, &c." *Held*, that this was a covenant by A. to stand seized to the use of B. for his life, and for any son or sons of his after his death. If B.'s son was born at the time the deed was executed, the remainder was then vested in him; if born afterwards, the seizin remaining in

the covenantor was sufficient to feed the contingent use when it came into *esse*, and enabled the statute of uses to transfer the equitable use into a legal estate in fee in remainder, B. having had a son, who survived him.—*Borden* v. *Thomas*, 209

3. A warranty by a tenant for life is void against all persons, claiming in remainder or reversion; and so are collateral warranties by an ancestor, as against his heirs at law, the ancestor having no estate of inheritance in possession. *Ibid.*

See EVIDENCE—COVENANT.

DESCENT.

1. Tamar Sanderlin had issue a legitimate son, Isaac Sanderlin, and an illegitimate daughter, named Zelia, who intermarried with Lemuel Sawyer.—They died, leaving an only child, who is the *propositus*, to whom the premises were devised in fee by her grand-mother, Tamar. The *propositus* died without issue, leaving, as her nearest relations, a brother and sister of her deceased father, who are the lessors of the plaintiff, and also the said Isaac Sanderlin, under whom the defendant claims.—*Sawyer* v. *Sawyer*, 407

2. *Held* by a majority of the Court, RUFFIN, C. J. *dissentiente*, that no part of the land descended to Isaac Sanderlin, but the whole descended to the brother and sister of the father of the *propositus*. *Ibid.*

3. *Held* by RUFFIN, C. J. that the land descended equally to Isaac Sanderlin, the uncle *ex parte materna*, and to the brother and sister, uncle and aunt, *ex parte paterna*. *Ibid.*

DEVISES & LEGACIES.

1. A man, having several children, advanced to each of his five eldest children, the children of a first wife, property real and personal, which he valued at $2,000. He then made his will as follows: "If it should so happen, that any of my children by my last wife should marry, &c. the County Court shall appoint some three or more persons, to set apart to him or her such part of my estate on hand, as may be most for their advantage, and the advantage of the heirs at large without a draw: which allotment, so made, shall be binding on all the heirs, provided that each allotment, so allotted, shall not exceed in value the sum of $2,000, so as to make them all equal. All the valuations are to be made on the same scale or principle, as the valuation I

put on the property I have heretofore given my sons, &c. a schedule of which they or some of them can produce of property they have received, on which is a valuation of $2000 I then put. And at a final division of the property among my children, it is my desire it should be equally divided among all my children." No such schedule, as that mentioned in the will, was produced. *Held*, that the commissioners, appointed by the County Court, did right in fixing the valuation of the property for the younger children at $2000 each, at the time the allotment was made to them. *Mayo* v. *Mayo*, 84

2. A bequest of slaves to A. and "after her death to be equally divided between the heirs of A's. body," is a good limitation over to the children of A. *Miles* v. *Allen*, 88

3. Where the person, in possession of this property, after the death of A. claimed it as his own, it was not necessary for the remainder-men to make any demand on him before they commenced their action; and they are entitled to damages, for the detention of the property, from the time of A's. death. *Ibid.*

4. Where a father had made a parol gift of slaves to a daughter, and afterwards died, leaving a last will and testament, by which he only devised lands and appointed executors, but made no disposition of his personal property; *Held*, that this was not such an intestacy, as was meant by the proviso of the act of 1806, Rev. St. ch. 87, sec. 17, that the daughter therefore acquired no title to the said slaves as an advancement, in the case of an intestacy, and the executors were entitled to recover them from her or her assignees. *Person* v. *Twitty*, 115

5. Where a devise or bequest is, after sundry devises and bequests, "all the remainder of my estate, I leave to my wife Elizabeth, to be divided among my children as she thinks proper," and she is appointed executrix of the testator's will—*Held*, that no beneficial interest passed to her, by this bequest or devise, in the remainder so disposed of, but she only took it in trust for the benefit of her children and to be divided among them. *Green* v. *Collins*, 139

6. The Court before whom the case was tried, erred in declining to advise the jury, unequivocally, as to the proper construction of the will, upon which con-

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struction a material question in the cause necessarily arose. *Ibid.*

EJECTMENT.

1. A plaintiff in ejectment can only recover upon the strength of his own title, as being good against all the world, or as good against the defendant by estoppel. *Clarke* v. *Diggs*, 159
2. The landlord has a right to be made defendant in an action of ejectment, in which the declaration has been served on his tenant, as tenant in possession. *Wise* v. *Wheeler*, 196
3. No other person has a right to be so made defendant, without the consent of the plaintiff; and if the plaintiff consents, the person made defendant must not only enter into the common rule, but must also admit that he was in actual possession at the time of the service of the declaration. *Ibid.*
4. When a new defendant is thus substituted, the declarations of the tenant, on whom the declaration was served, cannot be given in evidence against him. *Ibid.*
5. A plaintiff may recover in ejectment upon the demise of only one of several tenants in common, to the extent of his interest; and there may be a general verdict and judgment that he recover his term, as under the writ of possession the lessor of the plaintiff proceeds at his peril. *Holdfast* v. *Shepard*, 361
6. Where, in an action of ejectment, the defendant relied upon the statute of limitations, and the evidence was, that the defendant and A., under whom he claimed, had had seven years actual possession, except for the space of four or five months, an interval that elapsed between the time when a tenant of A. left the premises, and the time when the defendant entered under his purchase. *Held* by the Court, that the interval between these two occupations was too large to found a presumption on of a continued possession, in the absence of any intermediate act of ownership by A. or any one under him. *Ibid.*

ESCAPE.

The act of 1777, ch. 118, sec. 11, Rev. St. ch. 190, sec. 20, alters the law, as it was under the statute 4 Ed. 3, by giving the action of debt for escape against the executor of the sheriff, as well as to the executor of the creditor. *Wright* v. *Roberts*, 119

See BAIL.

EVIDENCE.

1. Where a bond is offered in evidence, and the obligor offers to shew that the bond has been declared fraudulent by a Court of Equity, and that it should be surrendered, the evidence is inadmissible, because the bond, being uncancelled, is still good at law, and the obligor can only proceed in equity to enforce the decree by process of contempt. *Davidson* v. *Sharpe*, 14
2. A deed of trust for land need not be proved, on the trial of an action of ejectment, by a subscribing witness. The registration is sufficient *prima facie* evidence of its execution. *Harper* v. *Burrow*, 30
3. The testimony of a witness on a former trial, where the present plaintiff and defendant were not parties, cannot be given in evidence, though that testimony was against his own interest. *Ibid.*
4. A witness may be compelled to testify in a civil suit, though his evidence may militate against his own interest. *Ibid.*
5. Where a plaintiff in a petition, claims to be an assignee by a written instrument, whether he is so or not, by the terms of the instrument, is a question of law for the Court, not of fact to be submitted to a jury. *Clark* v. *Edney*, 50
6. Where one consideration is mentioned in a deed, and others referred to, though not specified, the latter may be proved by parol. *Chesson* v. *Pettijohn*, 121
7. It is a well-established rule, that the loss or destruction of a conveyance may be proved by a party to the suit, as a ground for letting in, to the jury, the secondary evidence of a copy, or other inferior evidence. *Harper* v. *Hancock*, 124
8. But the Court never intended to relax the general rule, that the best evidence must be produced, beyond the plain necessity of the case, or where it did not appear clear, that the higher evidence was not accessible to the party. *Ibid.*
9. The loss must therefore be proved by the person, in whose possession the conveyance is presumed to be. *Ibid.*
10. But if a party, who is, *prima facie*, presumed to have possession of the original deeds of his grantor, because he bought with special warranty, swears that he never did have the originals, his evidence is not sufficient to establish the loss, as the presumption is, in that

case, that the grantor has them. until rebutted by such grantor's oath. *Ibid.*
11. In an action on a bond, one, who is an obligor, but who is not a party to the action, may be examined as a witness for the defendant, his co-obligor; and more especially, when the defendant had executed a release to the witness. *Ligon* v. *Dunn*, 133
12. Grants from the Sovereign, when enrolled in the office from which they emanate, are there records, and copies of them may be used in evidence by all persons, except those who would be entitled to the originals. *Clarke* v. *Diggs*, 159
13. Copies of Abstracts entered in Lord Granville's office are evidence. *Ibid.*
14. A party is never permitted to produce general evidence to discredit his own witness; but if a witness prove facts in a cause, which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise. *Shelton* v. *Hampton*, 216
15. Where a deposition is read in evidence, the opposite party may contradict the witnesses, by shewing that he has subsequently made different statements, without having put to the witness the usual preliminary questions, as such could not be put from the nature of the case. *Roberts* v. *Collins*, 223
16. On the trial of one indicted as accessary in the crime of murder, a transcript of the record of the conviction of the principal was received in evidence, it appearing in the transcript that after the conviction of the principal he appealed to the Supreme Court, from which the case was sent back to the Superior Court, but the decision of the Supreme Court not appearing in the transcript. *Held*, that notwithstanding this omission, and though the decision should properly have been entered on the record, yet the transcript was good evidence against the accessary, for at most the judgment against the principal was only erroneous. *State* v. *Duncan*, 236
17. An accessary cannot take advantage of error in the record against the principal, and the attainder of the principal, while unreversed, is *prima facie* evidence against the accessary of the principal's guilt. *Ibid.*
18. Evidence on the part of a prisoner, indicted as an accessary in murder, that he was a man of

violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the deceased, is irrelevant and inadmissible. *Ibid.*

19. Threats of other persons against the deceased, or admissions by them that they had killed him, are only hearsay, and cannot be received in evidence. *Ibid.*

20. The declarations and admissions of an agent, after his agency has ceased, as to past transactions, are not competent evidence against his principal. *Williams* v. *Williamson*, 281

21. To make the acts of one person evidence against another, as his agent, the creation of the agency must, in the first instance, be established by proper evidence, independent of such acts and declarations themselves. *Ibid.*

22. Where an action of tort is brought against the owner of a vessel for not delivering a cargo entrusted to him, an alteration by the plaintiff in the bill of lading, in which there had been a mistake, does not in any degree affect his right to damages. *Benbury* v. *Hathaway*, 303

23. A confession, made by a prisoner, while in prison, is evidence against him, provided it be the prisoner's own act, not unduly obtained by threats or promises. *State* v. *Jefferson*, 305

24. When the original records are offered in evidence in the Court to which they belong, they should be received, because the Court is presumed in law to know its own proceedings; but in another Court, the proper evidence is a copy of the record, authenticated by the seal of the Court. *Ward* v. *Saunders*, 382

25. The declarations of a person, who has executed a deed, at a period subsequent to such execution, are not evidence against the grantee. But the declarations of a grantor, between the time when the deed falsely bears date, and the time when it was actually executed, are evidence as to the fraudulent intent of the parties. *Ibid.*

26. On a suit for the penalty for trading with a slave, when it was proved the defendant offered to shew the plaintiff his "barter-book" in order to convince him that he had paid nothing to the negro, who had delivered the articles to his agent, it was not competent for the plaintiff, on the trial, to prove by the witness, before whom this declaration

was made, in order to shew the *time* when the transaction took place, "what was the time of trading, *as appeared on the book.*" Notice to produce the book should have been proved, before such evidence was admissible. *Whitley* v. *Daniels*, 480

See MARRIAGE—CONTRACTS—INDICTMENT—WILLS—RAPE.

EXECUTIONS.

1. A purchaser at a constable's, as well as at a sheriff's sale, is bound to pay the whole amount of his bid to the officer selling, and the latter, and his sureties in his official bond, are liable to the person whose property is sold, for the excess beyond the amount required to satisfy the execution in the officer's hands. *State* v. *Read*, 80

2. Where, after a judgment, a memorandum was made on the docket by the parties, that execution should not issue before a certain day, as this forms no part of the judgment, if the execution issue before that day, no one can complain of it, but the parties. As to all other persons, the execution is not even voidable. *Cody* v. *Quinn*, 191

3. A sale of land, under a *fi. fa.* bearing teste after the death of the defendant, in the execution, where his heirs have not been made parties, is void.—*State* v. *Pool*, 288

4. The act of Assembly of 1823, ch. 74, relating to the sales of land under execution in the county of Pasquotank and other counties therein named, is a local and private act, and therefore not repealed by the act of 1836, Rev. St. ch. 1, sec. 2, being within the proviso in sec. 8. *Grandy* v. *Morris*, 433

5. By the operation of this act of 1823, sales of land under execution in the counties therein named, are, as to the places of sale, put on the same footing as sales before the act of 1820, which directed them to be at the Courthouse; and in those counties, the sheriff may now sell lands under execution at such places as he in his sound discretion shall judge most expedient. *Ibid.*

6. Under the acts of 1820, 1821 and 1822, the sales of land under execution, in the county of Currituck, are excepted from the general provisions of those acts, directing the places where such sales should be made. *Humphries* v. *Baxter*, 437

7. In Currituck County, therefore, lands may be sold under execution by

the sheriff, at any place, which in his sound discretion he deems most proper. *Ibid.*

See EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS.

1. The County Court has no right to appoint an administrator with the will annexed, when there is an executor, laboring under no disability, until the renunciation of the executor, and such renunciation must appear of record.—*Springs* v. *Erwin*, 27
2. Such an appointment is not merely voidable; it is absolutely void. *Ibid.*
3. Only those things, in which a person has a beneficial interest, are assets, and not those which he holds in trust for another. *Green* v. *Collins*, 139
4. An agreement between counsel, that, in an action at law against an executor or administrator, the jury may inquire as to equitable as well as legal assets, must be inoperative at law, as the Court cannot assume a jurisdiction which the law does not confer; and, moreover, there is an essential distinction between the nature and application of legal and equitable assets. *Ibid.*
5. A Court of Law knows nothing of trusts, except so far as they are brought within its jurisdiction by statute. *Ibid.*
6. An executor or administrator is not answerable in a Court of Law, as for a *devastavit* in relation to equitable assets, unless so far as these are affected by the act of 1836, Rev. Stat. c. 46, s. 22. *Ibid.*
7. If an executor or administrator refuse to call upon the trustee of a legal estate, the equity of which is alleged to be in their testator or intestate, the only tribunal to decide upon the default is a Court of Equity. *Ibid.*
8. One, who sues as administrator or executor, is not liable for costs *de bonis propriis*, if he fails in his suit. *Collins* v. *Roberts*, 201
9. Goods of a deceased person, in the hands of an executor *de son tort*, cannot be taken in execution for the personal debts of such executor, no more than in the case of a rightful executor or administrator. *Grant* v. *Williams*, 341
10. An executor *de son tort* cannot be called upon to support a disabled slave of the deceased, under the act of Assembly, (Rev. Stat. ch. 89, sec. 19.)—*Wardens of Hyde* v. *Silverthorn*, 356
11. If an obligee make his

will and appoints any one of his obligors his executor, it is a release or extinguishment of the debt, as to all the obligors: But when the Court appoints one of the obligors to be the administrator of the obligee, it only suspends the debt on the bond during the administration of that administrator, and it does not release nor extinguish it. *Ferebee* v. *Doxey*, 448

FORGERY.

Falsely, wittingly and corruptly rubbing out, erasing or obliterating a release or acquittance on the back of a note or bond, or elsewhere, does not, according to the law of North Carolina, amount to the crime of Forgery. *State* v. *Thornburg*, 79

FRAUDS AND FRAUDULENT CONVEYANCES.

1. A voluntary deed is not void as to creditors, when the donor retains sufficient property to pay his debts, and out of which the claims of the creditors may be satisfied. *Arnett* v. *Wanett*, 41
2. The act of assembly of 1840, ch. 28, sec 3 and 4, applies to voluntary deeds made before the passage of that act, as well as to those made subsequently. *Ibid.*

FREE PERSONS OF COLOR.

See PLEADING and PRACTICE.

GUARANTY.

A, on the 21st of August 1841, transferred to B. certain promissory notes of C., which he at the time guaranteed. B. made no application to C. for the payment of the notes until the 29th of July 1842, and gave no notice to A. that the notes were unpaid, and he should hold him responsible on his guaranty, until the 29th of February 1844. *Held*, that B. had been guilty of such *laches* as to discharge A. from his guaranty. *Beeker* v. *Saunders*, 380

See JUSTICES.

HOMICIDE.

1. On a trial for murder, the question of provocation is proper for the decision of the Court; for whether certain facts amount to a sufficient provocation to palliate a killing from murder to manslaughter, is entirely a question of law. *State* v. *Craton*, 164
2. When one man is *unlawfully* restrained of his liberty and kills the aggressor, the offence is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when

the restraint is upon one man by another, so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained, in that manner and for that cause, kill the other, it is murder. *Ibid.*

3. A husband has a right to use compulsion, if necessary, to enable him to regain the possession of his wife, from one in whose society he finds her, and who, he has good reason to believe, either has committed, or is about to commit adultery with her. *Ibid.*

4. Whether an instrument by which death is occasioned, if it be in fact as described by the testimony, be one, by which death may or may not be probably caused, is a question of general reason, and therefore proper for the Court; and if it be doubtful, whether it would probably cause death, the Court should direct a conviction for manslaughter only. *Ibid.*

See EVIDENCE.

HOTCHPOT.

The value of an advancement is to be estimated as of the time the advancement was made, & not as of any subsequent term. *Lamb* v. *Carroll*, 4

HUSBAND AND WIFE.

Where, in a decree of divorce, alimony is assigned to the wife in certain specific articles, as, for instance, slaves, the wife's right to the enjoyment of this property only continues until a reconciliation or until the death of either party. And during the separation, the provision for alimony may be altered, at the discretion of the Court, upon any change of circumstances. *Rogers* v. *Vines*, 293

See MARRIAGE.

INDICTMENT.

1. In an indictment for perjury, it is not necessary to set forth the pleadings in the former case, in which the perjury is alleged to have been committed; our Act of Assembly of 1842, c. 49, having altered the common law in that respect. *State* v. *Hoyle*, 1

2. There is but one Statute in this State punishing the crime of Perjury, Rev. St. ch. 34, sec. 50 and 52, and therefore an indictment for that crime, which concludes against *the Statute*, is right. *Ibid.*

3. When the Perjury, on which an indictment is founded, is alleged to have been committed on the trial of a cause at a special term of a Superior Court, it is not necessary to set forth in the indict-

ment the order of the Judge directing such special term to be held, nor the appointment by the Governor of the particular Judge, who is to hold it. *State* v. *Ledford*, 5

4. Nor is it necessary to prove either of those facts on the trial of the indictment. *Ibid.*

5. Keeping an open shop and selling goods on Sunday, is not an indictable offence in this State.—*State* v. *Brooksbank*, 73

6. Profanation of Sunday is only punishable here by certain pecuniary penalties, imposed by the Legislature, and to be recovered before Justices of the Peace. *Ibid.*

7. An indictment against a free person of color, which charges, that he did "buy of, traffic with, and receive from a certain negro slave, &c. one peck of corn," &c. is good, although the act making the offence of a free person of color dealing with a slave, only uses the words "if he shall trade with any slave, either by buying of or selling to him," &c. The other words used in the indictment are mere surplusage. *State* v. *Cozens*, 82

8. On the trial of an indictment for murder, the prisoner offered a witness, who was so much intoxicated, as to be incapable of understanding the obligation of an oath. The Court refused to permit him to be sworn, but told the prisoner he might recall him when he was sober. The prisoner examined other witnesses, but did not re-call this one. *Held*, that this was no cause in law for a new trial. Granting or refusing a new trial on this ground, was a matter of discretion for the Judge. *State* v. *Underwood*, 96

9. A new trial was moved for on the ground that the Grand Jury had been drawn by a boy of thirteen years of age, and that such illegal drawing might have affected the composition of the petit jury. *Held*, that this objection, if a valid one at any time, came too late. It should have been made before the petit jury was sworn in the form of a challenge to the array. *Ibid.*

10. On the application of a prisoner to remove or continue his case, the discretion to do either rests with the Judge of the Superior Court, and cannot be reviewed in this tribunal. *State* v. *Duncan*, 98

11. A witness for the State, on the trial of an accessary before the fact, in a capital case, being asked by the defendant whether he had stated, before

the examining magistrate, certain facts he was then narrating, replied that he had not, having been deterred by the threats of the principal, and was proceeding to state the conversation between himself and the principal, when the defendant objected to this evidence. *Held*, that the evidence was admissible. *Ibid.*

12. Where a principal and an accessary are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessary, unless judgment has been first rendered against the principal. *Ibid.*

13. The words *vi et armis* in an indictment are now superfluous, and more especially so in an indictment against an accessary, as his offence tends only to a breach of the peace, and is not of itself, an actual breach of it. *State* v. *Duncan*, 236

14. Where, upon a trial for fornication or adultery, one party is found guilty and the other not guilty, no judgment can be rendered against the former. *State* v. *Mainor*, 340

15. In an indictment for a libel, the indictment must set forth matter on its face libellous, in which case the Court is to judge whether it be so or not; or it must aver that the matter charged, though not on its face libellous, was intended in fact to be so, and then the question is to be submitted to a jury. *State* v. *White*, 418

16. Where, on the trial of an indictment, the jury find a verdict of guilty generally, and that appears on the record, this Court cannot consider it as a special verdict, subject to the opinion of the Court, notwithstanding the statement of the case by the Judge so reports it. *State* v. *Cox*, 440

17. A presentment, made within two years after the commission of a misdemeanor, on which an indictment is founded, is the commencement of a prosecution, within the meaning of our act of assembly and prevents the statute of limitations from attaching. *Ibid.*

18. A presentment need not be signed by all the jury. It should be handed to the Court by the foreman, who is the organ of the grand-jury, to and from whom communications are made with the Court. It should be made in the presence of the jury, but when entered of record, no further evidence is required of its authenticity. *Ibid.*

19. Neither a presentment of a grand-jury nor an in-

dictment requires necessarily that it should be signed by any one. *Ibid.*

20. It is the returning of the bill or indictment, publicly, in open Court, and its being there recorded, that make it effectual.—*Ibid.*

See ROADS—JURY—PLEADINGS AND PRACTICE.

INSOLVENT DEBTORS.

1. Where a debtor has been arrested on a *ca. sa.* and given bond for his appearance at Court under the insolvent debtor's act, and the sureties surrender him and he is ordered into custody, the *committitur* is in execution, and the sheriff has no power to discharge the debtor out of prison, of his own will, and without the order of the Court.—*Wright* v. *Roberts*, 119

2. Where an insolvent debtor, in filing his schedule, only surrenders his interest in certain property, conveyed by a deed in trust, and the jury, upon an issue, find the deed fraudulent, he must be imprisoned, until he makes a surrender of the whole property so conveyed.—*Hutton* v. *Self*, 285

JUDGMENTS IN OTHER STATES.

1. Where a decree or judgment in another State is produced in evidence in one of our Courts, it is not necessary to shew, by any extrinsic evidence, that the judgment or decree was warranted by the laws of the State in which it was pronounced. The judgment or decree itself is the highest evidence of that fact. *Davidson* v. *Sharpe*, 14

2. A judgment or decree, pronounced in any State, against an inhabitant of another State, upon whom process in the suit has not been served, is only binding in the State, in which such judgment or decree has been rendered. *Ibid.*

JURY.

1. The Court has a right to excuse jurors, who have been summoned upon a *venire* in a capital case, upon their application, for any reasonable cause.—*State* v. *Craton*. 164

2. The State's challenge to a juror for cause, need not be decided on immediately, but it is in the discretion of the Court to let it stand until the panel be gone through. *Ibid.*

JUSTICES JUDGMENTS, &c.

1. A Justice's warrant in a civil case was dated in June 1843, the judgment in June 1844, and the execution in September

1844, and the judgment and execution were on the same paper with the warrant—*Held*, that it did not appear on the face of these proceedings, that the judgment was void, so as to render the officer who served the execution guilty of a trespass. *State* v. *Conolly*, 243

2. If the judgment could be reversed by a writ of false judgment, yet it could not be impeached collaterally. *Ibid.*

3. The continuances of a warrant need not be stated on the face of the proceedings. *Ibid.*

4. A justice of the peace has no jurisdiction of the question of guaranty.—*Wall* v. *Nelson*, 300

5. Justices' judgments are not property in the plaintiff, for which an action of trover will lie. *Cobb* v. *Cornegay*, 358

6. They are not records, but they are judicial determinations and muniments of the rights of both parties. *Ibid.*

7. A person placed in the hands of a constable a note for $158 80 for collection, upon which the constable took out two warrants against the debtor, one for $80 and one for $78 80, as due by note, and the debtor appeared and confessed judgment before the justice according to the tenor of the warrants. Executions issued, and the constable failed to levy them on property subject to their satisfaction. *Held*, by the majority of the Court, RUFFIN, C. J. *dissentiente*, that the judgments, confessed by the debtor in the manner stated, were valid judgments; that he was estopped to deny their validity, and the constable was bound to use due diligence in collecting the executions issued on the judgments. *State* v. *Mangum*, 369

8. *Held* by RUFFIN, C. J. that as no note was shewn to have been in existence but the note for $158 80, of which the justice had not jurisdiction, the judgments were void, and that the confession of judgment by the debtor could not confer the jurisdiction or waive the want of it. *Ibid.*

9. In the case of the return of the levy of a justice's execution on land to the County Court, though notice is directed by law to be given to the defendant, no evidence is required of that notice, but the record of the County Court, ordering the *venditioni exponas*. *Ward* v. *Saunders*, 382

10. The description in the return of a constable of a levy on land, need not literally comply with the

act of Assembly in such cases, its requirements being substantially, that the land should be sufficiently distinguished and identified. *Ibid.*

11. In the case of a return, by a justice, of a levy on land, with the corresponding papers, it is not necessary that it should appear, by a distinct certificate of the Clerk, that these papers have been enrolled in bound books, as required by the act of Assembly. The ordinary copy of the record, certified by the Clerk under the seal of the Court, is sufficient evidence of the enrolment. *Ibid.*

LANDS OF DECEASED DEBTORS.

1. Although a *scire facias* against heirs and *terre-tenants* need not name them, but leave it to the sheriff to summon and return them, yet the judgment is always against particular persons, and the writ of execution must name the same persons *Roberson* v. *Woollard*, 90

2. An execution commanding the sheriff to sell the lands of A. B. deceased, "in the hands of his heirs," without naming the heirs, is void, and a sale under it confers no title. *Ibid.*

LEGACIES.

See DEVISES AND LEGACIES.

LESSOR AND LESSEE.

1. Where a lease was given, upon condition that the lessee, at the end of each year, should give bond and surety for the rent of the succeeding year, and at the expiration of one year the lessee failed to give such bond and surety. but the lessor was absent and did not demand it—*Held*, that no forfeiture was incurred, it being the duty of the lessor to make the demand. *Tate* v. *Crowson*, 65

2. The law leans against forfeitures; and when the agency of the landlord is involved in any way in the act, which is to work or prevent a forfeiture, he ought so to act, as to make it appear clearly that he means to insist upon the forfeiture. *Ibid.*

3. The lessee shall not be punished without a wilful default, which cannot be made appear, unless an actual demand be proved, and that it was not answered. *Ibid.*

See USURY—LIBEL—INDICTMENT.

LIMITATIONS, STAT. OF.

1. If, in reply to the plea of the statute of limitations, the plaintiff wishes to avail himself of the pendency of a former suit, he must set forth the suit specially in his replication. *State* v. *Hankins*, 423

2. By the practice in this State, if no replication is actually entered, a general one is understood.—*Ibid.*

3. When the statute of limitations is pleaded to an action on the bond of a sheriff, clerk, &c., the plaintiff cannot reply that a former suit for the same cause of action had been brought within the proper period, in which there had been a non-suit, discontinuance, &c. In suits of this kind, there is no such saving against the operation of the statute. *Ibid.*

See EJECTMENT.

LITERARY BOARD.

1. The President and Directors of the Literary Board have no right to allow, and are not bound to pay, their Secretary a *per diem* compensation, for a greater number of days than they are actually in session. *Battle* v. *Literary Board*, 203

2. Where the Board passed a resolution that their Secretary should be allowed so much *per diem*, while he was employed, the construction is that he was allowed the *per diem* pay, only while the Board itself was in session. *Ibid.*

MARRIAGE.

1. It is not necessary to the validity of a marriage, that the parties should have obtained a license from the Clerk of the County Court. The omission of the license only subjects the minister or justice performing the ceremony to a penalty.—*State* v. *Robbins*, 23

2. It is sufficient proof of a marriage, that the ceremony was performed by one, who was in the known enjoyment of the office of a justice of the peace, and notoriously acting as such. It is not necessary to produce his commission from the Governor. *Ibid.*

MILLS.

1. One, who complains of a nuisance to his land by the erection of a mill dam, is not obliged to wait until the expiration of a year, before he files his petition to recover damages under the act of Assembly, Rev. St. ch. 74. *Cochran* v. *Wood*, 194

2. When the suit is brought within the year, the damages are necessarily limited to the time the injury has existed. *Ibid.*

MORTGAGE.

One, who has made a mortgage of property to secure a debt, may afterwards convey the same property to the mortgagee absolutely, in satisfaction of the debt, provided the conveyance be *bona fide*

and for a fair price. *Shelton* v. *Hampton*, 216
See PLEDGES.

NEW TRIAL.
See PLEADING AND PRACTICE.

OFFICIAL BONDS.
Under the act of assembly, Rev. St. ch. 81, sec. 3, prescribing the remedy against sheriffs, constables, &c. when they have collected money and failed to pay it over, the party injured may have his action on the officer's bond against any one or more of the parties to the bond, without joining the principal or all the sureties. *Guess* v. *Barbee*, 279

PARTIES.
1. Where a paper under which a plaintiff in a petition claims to be an assignee does not on its face purport to be an assignment, but only an order for money, it is necessary that the alleged assignor or his personal representative should be a party to the petition, either plaintiff or defendant. *Clark* v. *Edney*, 50
2. On a petition against administrators for a distributive share of an estate, all persons entitled to distribution should be made parties. *Ibid.*

PARTITION.
A petition was filed in the County Court, and order made for the partition of certain slaves among the tenants in common. The plaintiff was the agent of one of the petitioners. The commissioners made a division, and awarded to the petitioner, as agent, certain slaves, and also a sum of money to be paid by another of the petitioners to him as agent, to equalize the shares. The report was returned, and confirmed by the Court, but no formal decree drawn. The agent cannot, by a notice in his own name, call upon the other petitioners to have the decree entered in his favor—or to pay the sum so awarded. *Irwin* v. *King*, 219

PARTNERS.
One partner made an advance of $808 12 cents to the firm, and took a memorandum therefor in the shape of a note signed by the other partner and payable to the first. Afterwards the firm was dissolved, and no actual account of the partnership being taken, the partner, who had made this advance, agreed to take a certain amount as his share, and the other partner was to take all the remainder of the effects of the firm, and also "to pay all the debts due from

firm." *Held*, that by this settlement, the partner, who made the advance, was precluded from claiming the sum advanced as one "of the debts of the firm." *Patterson* v. *Martin*, 111

PATROLLERS.

1. In the absence of any special regulations by the County Court, no act of a Patroller in the discharge of his patrolling duties can be valid, unless a majority of the Patrollers in the district be present, and a plurality of these sanction the act. *State* v. *Hailey*, 11
2. The office of a Patroller is both judicial or *quasi* judicial, and executive. *Ibid.*

PAYMENT.

The acceptance by the obligee of a bill of exchange, in discharge of a bond, will, in an action on the bond, support the plea of payment. *Ligon* v. *Dunn*, 133

PLEADING AND PRACTICE.

1. In every declaration for money paid for the use of another, it must be laid to have been paid at his request; but this request may be express or implied, and it is always implied in law, where the payment is subsequently recognized by the person for whom it is made.—*Taylor* v. *Cotten*, 69
2. A plea of accord and satisfaction to an action on a bond, is not good, unless it avers an acquittance under seal. *Ligon* v. *Dunn*, 133
3. The Superior Courts, when an appeal is taken to the Supreme Court, should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. A report of the whole trial below, is out of place in the case to be sent to the Supreme Court. *Green* v. *Collins*, 139
4. Though the party, against whom the Judge in his charge commits an error, obtains a verdict, yet when the principle, so erroneously laid down, might have prevented the defendant from making his full defence, a new trial will be granted. *Clarke* v. *Diggs*, 159
5. Where it was suggested to the Court, on behalf of the State, that there were errors in the transcript of the case sent up, and it was also suggested that these errors existed in the original record below, and that they were mere misprisions of the Clerk of that Court, on motion of

the Attorney General, it was ordered that a *certio rari* issue, and, although it was a capital case, that the *certiorari* be made returnable at a day posterior to the next term of the Court below, in order that that Court might, if they thought fit, make the proper amendments in their record, before the return of the *certiorari*.—The errors consisted in mistaking the name of the Judge who held the Court, when the indictment was found, and omitting altogether the name of the Judge before whom it was tried. *State* v. *Craton*, 164

6. Although it is more correct, in making up the record of a criminal trial, that the presence of the accused should be expressly affirmed, yet it is sufficient if it appear by a necessary or reasonable implication: as where it is stated, that the accused, who had been before committed to the custody of the sheriff, was ordered to be brought to the *bar*, and immediately thereafter he is called, by the jury in giving, and the clerk in recording, the verdict, the prisoner at the *bar*, and next, the Court, in passing sentence, adjudged that the prisoner be *taken back* to the prison. *Ibid.*

7. Where the County Court, upon affidavits, ordered an amendment of their records, and the party aggrieved appealed to the Superior Court, it was the duty of the Superior Court to have decided upon the question of amendment, and if the Superior Court dismissed such appeal without deciding upon the merits, their judgment must be reversed. *Slade* v. *Burton*, 207

8. The Superior Court may, upon such appeal, not only review the decision of the County Court, on the affidavits there filed, but may hear further evidence, as to the propriety of the order of the County Court. *Ibid.*

9. The Supreme Court cannot look into affidavits, filed in the Court below, upon the question whether dower was properly admeasured or not. *Bowman* v. *Thompson*, 224

10. The Court, to which, on the removal of a cause, the transcript of record is sent, is the sole judge whether the transcript is properly verified by the seal of the Court from which it is sent, and all other Courts are bound by its decision. *State* v. *Duncan*, 236

11. After a free person of color has been convicted on an indictment, under the act of assembly, for marrying a slave before

the passage of the act of 1845, it is too late for him to apply to the Court to discharge him on the ground that the master of the slave had given his consent to the marriage. The defence should have been made on the trial. *State* v. *Roland*, 241

12. Where the jury find a general verdict of "guil ty," the Court must either pronounce its sentence upon the verdict or grant a new trial. *State* v. *Curtis*, 247

13. It cannot set aside the verdict and direct a judgment of acquittal to be entered for the defendant. *Ibid.*

14. Even where the jury find a verdict subject to the opinion of the Court on a point reserved, the Court cannot grant a judgment against the verdict, unless the jury say "they find such and such facts, and if, upon them, the Court think the law is with the defendant, they find him not guilty, if otherwise, guilty," or words in substance to that effect. *Ibid.*

15. Where an action is brought for a penalty imposed by a statute, or actions are brought founded on rights created by a statute, and for which there was no action at common law, the declaration, like an indictment, must be framed on the statute or statutes, stating not only the circumstances necessary to bring the case within the meaning of the act, but also expressly counting on it. *McKay* v. *Woodle*, 352

16. But this rule does not embrace the case, where a statute is simply remedial, giving an easier or cumulative remedy for a wrong, for which there was a remedy at the common law. *Ibid.*

17. Therefore, in an action for worrying, maiming, and killing the hogs of the plaintiff, while trespassing on the inclosed grounds of the defendant, the same not having a sufficient fence, according to the act of 1831, Rev. St. ch. 48, it was not a sufficient objection to the action, that the declaration did not refer to the statute, for the plaintiff had a remedy at common law. *Ibid.*

18. Although the enclosed land, within the bounds of which this trespass was alleged to be committed, belonged to more than one person, yet the actual perpetrators of the act are, even under our act of Assembly, individually liable. *Ibid.*

19. A single suit upon an administration bond may be brought by more than one of the persons entitled to distribution of the

intestate's estate, as relators. *State* v. *McKay*, 397

20. The Court, when the suit is at the instance of more than one relator, will adopt such rules as may be necessary to prevent injustice to the defendants, either as to the mode of declaring, the breaches assigned, the pleadings, the trial or the costs. *Ibid.*

21. Where, upon a writ of *recordari*, judgment was rendered against the plaintiff in the *recordari*, and the Clerk entered the judgment against the sureties only for the costs, and the Court at a subsequent term directed that the judgment should be entered *nunc pro tunc* against the sureties, for the *debt* as well as the *costs*; *Held*, that the Court had the power to do so, if in their discretion they thought it right, and that this Court could not revise such discretionary power. *Brady* v. *Beason*, 425

22. No matter, which might have been well-pleaded to the original action, can be heard as a defence to a *scire facias* brought to revive the judgment rendered in that action.—*Ferebee* v. *Doxey*, 448

PLEDGE.

1. A pledge of personal property, as for example, a pledge of Bank stock, differs from a mortgage, and is not included within the words or meaning of the Registry Act. *Doak* v. *Bank of the State*, 309

2. A mortgage is a pledge and something more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time. *Ibid.*

3. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation to be a lien on it. *Ibid.*

4. Generally speaking, a bill in Equity to redeem will not lie in behalf of a pledger, or his representatives, as his remedy is at law upon a tender of the money. *Ibid.*

Per NASH, J. The Legislature clearly recognized this distinction between mortgages and pledges of property, for the payment of debts to Banks, in the Act chartering the Cape Fear Bank in 1804, and in the Act chartering the Merchants' Bank of Newbern in 1834. *Ibid.*

6. Per RUFFIN, C. J. The stock in the Bank, pledged in this case, was not tangible property, subject to execution, and therefore did not come within the words or meaning of the Registry Act, nor within the mischief intended to be prevented by the Le-

gislature in directing incumbrances on property to be registered. Pledges of personal property, tangible to legal process, are as much within the Act as mortgages or deeds of trust. *Ibid.*

POWER OF ATTORNEY.

A power of attorney, or other authority, is in general revocable from its nature, and the power of revoking an authority may be exercised at any time before its actual execution. *Brookshire* v. *Voncannon*, 231

RALEIGH & GASTON RAIL ROAD COMPANY.

The State, under the act of 1840–1841, entitled "an act to secure the State against any and every liability incurred for the Gaston and Raleigh Rail Road Company, and for the relief of the same," cannot recover upon any bond given under the said act, unless it is proved that the whole amount of $500,000 had been secured by bonds. *Bennehan* v. *Webb*, 57

RAPE.

1. On a trial for rape, the prisoner may give in evidence that the woman had been his concubine, or that he had been suffered to take indecent liberties with her. *State* v. *Jefferson*, 305
2. But he cannot give in evidence, to prove her a strumpet, that she had had criminal connection with one or more particular individuals. It is a question of character and the evidence, as in other questions of character, must be of a general nature. *Ibid.*
3. On a trial for rape, the acts and declarations of the husband of the woman, on whom the offence is alleged to have been committed, are not admissible to discredit the wife, examined as a witness. *Ibid.*

RECORD.

1. A Judge, who by the general law and a permanent commission, holds a Superior Court, is not to require evidence that he is the Judge of the Court; and the record, made by him, establishes to those who succeed him, that he held the Court at the terms at which, according to the purport of the record, he appears to have held them. *State* v. *Ledford*, 5
2. The regularity of the proceedings of a Superior Court in point of time, as in other things, is to be presumed, unless the contrary appears. *Ibid.*

See EVIDENCE——PLEADING AND PRACTICE.

RECORDARI.

1. The writ of *recordari* is the foundation of all the proceedings in a case of *false judgment*. *Parker* v. *Gilreath*, 221
2. Therefore, where a *recordari* was returned and heard upon affidavits, the Court had a right to order the cause to be placed on the trial docket and stand there as on a writ of *false judgment*. *Ibid.*

REPLEVIN.

1. In an action of replevin, if the defendant wishes to put in issue the title of the plaintiff, he must plead that the title is in himself or some other person, by whose authority he took the property. Where the plea is only *non cepit*, &c., the plaintiff's title is not denied. *Rowland* v. *Mann*, 38
2. In an action of replevin for slaves, the jury, if they find for the plaintiff, must in their verdict assess the value of each slave. *Ibid.*

RETAILERS.

See Towns.

ROADS.

1. The County Court has no authority to discontinue any public road, but upon the petition of one or more persons, filed in the Court, and the other necessary proceedings prescribed by the Act of Assembly, Rev. Stat. ch. 104, sec. 2. And any order for discontinuing a public road, made otherwise than as the Act directs, is void. *State* v. *Shuford*, 162
2. A person who erects a fence across a public road, so attempted to be discontinued, is liable to an indictment therefor. *Ibid.*

SET OFF.

1. A judgment in one Court is a set off against an action of assumpsit in another Court. *Wright* v. *Mooney*, 22
2. Courts of Law in this State only recognize the *legal* claimant in a suit, and will not permit a set-off to be introduced against one, who is alleged to have an equitable assignment of the claim.—*Jones* v. *Gilreath*, 338
3. Where a suit is brought by A. against B. and C, a claim by B. alone against A. will not be allowed to be set off. *Ibid.*

SHERIFF.

1. Where a Sheriff returned an attachment levied on certain property, and was afterwards permitted by the Court, to which the attachment was returned, to amend his return, by stating that the property had been levied on by executions having priority to his attachment: *Held*, that he could not be held

responsible on his first return—but the record, as amended, must be taken to be true. *Cody* v. *Quinn*, 191

2. Where a writ from a Court of competent jurisdiction is delivered to a sheriff, he is bound to execute it, according to the exigency of the writ, without inquiring into the regularity of the proceedings, on which the writ is grounded. *Ibid.*

3. Under our statutes, a second action may be brought on a sheriff's bond, for money, which he holds as County Trustee, by any person who is injured thereby—*toties quoties*—until the penalty is exhausted. *State* v. *McAlpin*, 347

4. But the party injured may, if he prefers it, recover what is due to him by a *scire facias* on the first judgment, setting forth other breaches.—*Ibid.*

See BAIL—ESCAPE.

STATUTES.

One part of a statute may be public in its nature, while another is local and private; and those parts of these acts which concern "particular counties" merely, are to be taken to be of the latter kind, and are therefore saved from the general repealing clause of the act of 1836, ch. 1, sec. 2, by the proviso in the 8th section. *Humphries* v. *Baxter*, 437

TOWNS.

1. The act of assembly, passed in the year 1800, imposing a penalty on persons retailing spirituous liquors by the small measure, in the towns of Newbern and Wilmington, without the permission of the Commissioners of those towns respectively, is a private act, and was not repealed by the general law upon the subject of retailers, passed in the year 1825, nor by the act passed in 1836. *McRae* v. *Wessell*, 153

2. The ordinance of the corporation of a town, which is authorized to abate nuisances within the town and which declares that hogs running at large are nuisances, operates as well upon non-residents, who suffer their hogs to run within the limits of the town, as upon those who are actual residents.—*Whitfield* v. *Longest*, 268

3. An inspector of lumber, &c. in the town of Wilmington, is, by the usage of trade in that town, the agent of both buyer and seller, and, by the same usage, it is the privilege of the purchaser to designate the place of delivery and the duty of the seller to deliver it there. There-

fore, where lumber was placed with an inspector for inspection, and he was directed by the purchaser to deliver it on a particular wharf, and, by mistake he delivered it on another wharf, and especially when after such deposit the purchaser informed the seller he would not receive it there, and the property was afterwards casually destroyed by fire, *Held*, that the seller was responsible for the loss, and the purchaser was not bound to pay him the price he had contracted to give. *Buie* v. *Brown*, 404

TRESPASS.

No matter what an officer declares, when he seizes property, if he has a lawful process authorizing him to seize the property, he is not guilty of a trespass. *State* v. *Elrod*, 250

TROVER.

1. When there are two part owners of a chattel, and one of them, without the assent of the other, *destroys* the chattel or renders it *useless by use*, the former is liable in damages to the latter for the value of his share. *Guyther* v. *Pettijohn*, 388
2. In such a case, no demand is necessary before brnging the action. *Ibid.*

TRUST.

A conveyance of slaves is made to a trustee in trust for the sole and separate use of a married woman. The husband of this woman died, and she then by deed conveyed the slaves to A. *Held*, that A. acquired only an equitable title, and could not support an action at law to recover possession of the slaves. *Jones* v. *Strong*, 367

USURY.

1. In an action *qui tam*, &c. for usury, where the count was, that the defendant had corruptly taken, on the 20th of April, 1844, &c. usurious interest on a contract for forbearance, &c. from the 21st of April, 1843, to the said 20th day of April, 1844, and it appeared in fact that the usurious interest was taken for forbearance, &c. from the 21st of April, 1843, to the 21st of April, 1844—*Held* that there was a fatal variance between the count and the proof, and therefore the plaintiff could not recover. *Allen* v. *Ferguson*, 17
2. Although it is not requisite in a declaration for usury *qui tam*, &c. as it is in a plea, to describe the usurious contract specially, but it may be done generally yet the declara-

tion must be precise and accurate, in the statements of the sum lent and forborne, the time of forbearance, and the excess of interest; and these facts must be proved as laid. *Ibid.*

3. Where A. is the legal owner of a tract of land and leases it to B., though the agreement for the lease may be usurious, yet B. is estopped in an action of ejectment against him by A's. heirs, from denying the title of A. *King* v. *Murray*, 62

4. The usury could not be relied on as a defence, in an action for the rent reserved by the usurious contract of lease. *Ibid.*

5. Where a person takes a bond, and includes in it usurious interest, it is *prima facie* evidence that he knew what he was about; that there was no mistake, and that he did it knowingly, and, therefore, corruptly. If he relies upon there being a mistake in the calculation of interest, he must shew it. *Dawson* v. *Taylor*, 225

6 Under our statute of Usury, Rev. St. c. 117, the reservation of usurious interest makes the contract void, but it does not incur a forfeiture. The forfeiture is incurred only by taking usurious interest, as such. *Godfrey* v. *Leigh*, 390

7. Although there be a corrupt agreement for excessive interest, when the money is advanced, yet no action lies for the penalty, until some illegal interest has been received. *Ibid.*

8. So, on the other hand, if the contract was not for excessive interest, but the lender afterwards receives it, he forfeits double the sum lent. *Ibid.*

9. If the bond be given upon an usurious consideration, and a new bond of the borrower is afterwards substituted for it, the offence is not committed so as to subject the lender to the penalty, until the second bond be paid. *Ibid.*

10. But where the debtor does not give his bond, merely as a security, but gives that of another person, payable to him and belonging to him, in payment, and it is accepted as a payment, it is a payment in law, as well as in the common understanding of men. *Ibid.*

11. A payment in money's worth, received as a payment, is considered in law to be the same as a payment in cash. *Ibid.*

12. A contract for usurious interest may be laid, in a declaration for the penalty, as of the day when the illegal interest was paid. *Ibid.*

WIDOWS.

A widow cannot dissent from her husband's will by attorney. She must do so personally in open Court. *Hinton* v. *Hinton*, 274

WILLS.

1. A petition was filed for the re-probate of a will on the ground that the supposed testator was *non compos mentis*. A. and B. his wife, joined in the petition, she being one of the next of kin. Afterwards, A. the husband, caused himself to be joined with the executors in propounding the will, leaving his wife still one of the caveators. *Held* that, on the trial of the issue *devisavit vel non*, the declarations of A. were not admissible in evidence to prove the incapacity of the supposed testator.—*Enloe* v. *Sherrill*, 212
2. An issue to try the validity of a will is not an adversary suit—there are strictly no parties to it. *Ibid.*
3. Where a will is propounded, if the executor decline to prove it, or if there is ground for believing that the executor will not faithfully perform his duty, the Court will permit any person, who is interested in supporting the will, to join with the executor in propounding it, or to propound it alone. But the party applying for such an order must shew that he is not a mere intruder, but that he either has, or believes he has, an interest in establishing the will. *Ibid.*
4. When the declarations of any party to an issue *devisavit vel non* are admitted in evidence, it is because of the rule, that the declarations of any one against his interest is legal testimony as against him *Ibid.*
5. If a testator in his will refers expressly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be so described, as to manifest distinctly what the paper is, that is meant to be incorporated; and the reference must be to a paper already written, and not to one to be written subsequently to the date of the will. *Chambers* v. *McDaniel*, 226
6. On the trial of an issue *devisavit vel non*, the Court may instruct the jury to find as to the validity or invalidity of the whole or any part of the will, and the declarations of a legatee against his interest will be good evidence on such trial, so far as his interest extends. *Gash* v. *Johnson*, 289

7. If the declarations of a devisee of land, who is not a party to the suit, be received, that is no cause for a new trial, as the interest of such devisee, in the land devised, will not be affected by the finding in that issue. *Ibid.*

WITNESS.

A witness, who is summoned in this State, while casually here, but who resides in another State, cannot be amerced for non-attendance, if he has returned to his own State and is there at his domicil, where his presence as a witness is required in one of our Courts. *Kinzey* v. *King*, 76